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NORTH CAROLINA REPORTS.

VOL. 121.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

SEPTEMBER TERM, 1897.

REPORTED BY
ROBERT T. GRAY,
RALEIGH, N. C.
(VOL. X.)

GOLDSBORO, N. C.:
NASH BROTHERS, BOOK AND JOB PRINTERS.
1898.

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA.

SEPTEMBER TERM, 1897.

CHIEF JUSTICE:

WILLIAM T. FAIRCLOTH.

ASSOCIATE JUSTICES:

WALTER CLARK, DAVID M. FURCHES,
WALTER A. MONTGOMERY, ROBERT M. DOUGLAS.

ATTORNEY GENERAL:

ZEB VANCE WALSER.

SUPREME COURT REPORTER:

ROBERT T. GRAY.

CLERK OF THE SUPREME COURT.

THOMAS S. KENAN.

MARSHAL AND LIBRARIAN OF THE SUPREME COURT:

ROBERT H. BRADLEY.

108093

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

Geo H. Brown, Jr.,	1st Dist.	J. D. McIver,	7th Dist.
Henry R. Bryan,	2d "	A L Coble,	8th "
E. W. Timberlake	3d "	H. R. Starbuck,	9th "
W. S. O'B. Robinson,	4th "	L. L. Greene,	10th "
Spencer B. Adams,	5th "	W. A. Hoke,	11th "
Oliver H Allen,	6th "	W. L. Norwood,	12th "

SOLICITORS:

W. J. Leary,	1st Dist.	H. F. Seawell,	7th Dist.
W. E. Daniel,	2d "	J Q. Holton,	8th "
C. M. Bernard,	3d "	M. L. Mott,	9th "
E. W. Pou,	4th "	J. F. Spainhour,	10th "
W. P. Bynum, Jr.,	5th "	J. L. Webb,	11th "
M P. Richardson,	6th "	George A. Jones,	12th "

JUDGES OF THE CRIMINAL COURTS:

Criminal Circuit Court for Craven, New Hanover, Mecklenburg, Warren, Nash, Wilson, Robeson, Edgecombe, Halifax and Cumberland Counties:

Thomas H. Sutton.

Criminal Circuit Court of Buncombe, Madison, Haywood, Henderson and McDowell Counties:

H. G. Ewart.

LICENSED ATTORNEYS.

SEPTEMBER TERM, 1897.

Philip Williams Averitt	West Virginia.
Charles Exum Best	Orange County.
David Hunt Blair.	Forsyth County.
Frank Lee Blue	Cumberland County.
William Robert Braswell	Robeson County.
Mark Wiley Brown	Buncombe County.
Richard Burgess Bush	Caldwell County.
Henry Wiley Butler	Sampson County.
Edmond Lee Campbell	Cleveland County.
Luther Sidney Cannon	Caldwell County.
DeLeon Filimon Carlton	Duplin County.
Alfred Sidney Dalton	Edgecombe County.
Settle Dockery	Richmond County.
John Alfred Gavin	Duplin County.
Jesse Albion Giles	Stokes County.
Donald Gillis	Buncombe County.
Albert Sidney Grady	Duplin County.
Robert Lilly Gray	Wake County.
William Hawkins Green	Franklin County.
Louis Dallas Gulley, Jr.	Wayne County.
William Johnson Hannah	Haywood County.
Hiram Ulysses Hart	Buncombe County.
William Paul Hosier	Nansemond, Virginia.
Joseph Fletcher Jordan	Franklin County.
James Newell Kenny	Bertie County.
Thomas Bailey Lee	Davie County.
Hanfred Nichols Lockwood	Buncombe County.
Rufus Sidney McCoin	Guilford County.
Washington LaFayette McCracken	Haywood County.
Andrew Martin McGlamery	Davie County.
Duncan Evander McIver	Moore County.
Lawrence Pulliam McLoud	Buncombe County.
Andrew Jackson Medlin	Wake County.
Sidney Whitfield Minor	Granville County.
Hilliard Lee Morris	Buncombe County.
Morris Myers	Buncombe County.
Van Duckworth Norwood	Haywood County.
Carleton Eugene Palmer	Craven County.
Daniel Kirby Pope	Mecklenburg County.

James Watts Price	New Hanover County.
Henry Ozo Sapp	Forsyth County.
Paul Deems Satchwell	Pender County.
Walter Pike Savage	Buncombe County.
Robert Nirwana Simms	Wake County.
Ray Dean Sisk	Macon County.
William Anderson Stewart	Harnett County.
Morgan Bowman Stickley	Cabarrus County.
Percy Moran Thompson	Wayne County.
Doc Jones Thurston	Johnston County.
Max French VanGilder	Buncombe County.
Ceburn Daniel Weeks	Duplin County.
Charles Whedbee	Perquimans County.
Judson William Whitney	Polk County.
Patrick Henry Williams	Pasquotank County.
Wilbert Hubert Young	Wake County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Spring and Fall of 1898.

SUPREME COURT.

The Supreme Court will meet in the city of Raleigh on the first Monday in February, 1898, and the last Monday in September, 1898. The examination of applicants for license to practice law takes place on the first Monday of each Term and at no other time. The Docket for the hearing of cases from the First Judicial District will be called on the Tuesday next succeeding the meeting of the Court, and from the other Districts on Tuesday of each succeeding week, in numerical order, until all the Districts have been called.

SUPERIOR COURTS.

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31

NOTE—This calendar is adapted from that prepared by F. H. Busbee, Esq.
The parenthesis numeral following the date of a Term indicates the number of weeks during which the Court may hold.

FIRST JUDICIAL DISTRICT.

SPRING—Judge W. L. Norwood.
FALL—Judge W. A. Hoke.
Beaufort—‡Feb. 21 (2); May 30 (2); Nov. 28 (2).
Currituck—March 7 (1); Sept. 5 (1).
Camden—March 14 (1); Sept 12 (1).
Pasquotank—March 21 (1); Sept. 19 (1).
Perquimans—March 28 (1); Sept. 26 (1).
Chowan—April 4 (1); Oct. 3 (1).
Gates—April 11 (1); Oct. 10 (1).
Hertford—April 18 (1); Oct. 17 (1).
Washington—April 25 (1); Oct. 24 (1).
Tyrrell—May 2 (1); Oct. 31 (1).
Dare—May 9 (1); Nov. 7 (1).
Hyde—May 16 (1); Nov. 14 (1).
Pamlico—May 23 (1); Nov. 21 (1).

SECOND JUDICIAL DISTRICT.

SPRING—Judge Geo. H Brown, Jr.
FALL—Judge W L. Norwood.
Craven—†Feb. 7 (2); †May 9 (2); †Nov. 28 (2).
Bertie—‡Feb. 21 (1); May 2 (1); ‡Sept. 12 (1); Nov. 7 (1).
Halifax—†March 7 (2): †May 30 (2); Nov. 21 (1.)
Warren—†March 21 (2), †Sept 19 (2).
Northampton—April 4 (2); ‡August 1 (2); Oct 24 (2).
Edgecombe—†April 18 (2); †June 13 (2); †Oct. 10 (2).

THIRD JUDICIAL DISTRICT.

SPRING—Judge Henry R. Bryan.
FALL—Judge G. H. Brown, Jr.
Pitt—January 10 (2); †March 7 (2); April 4 (2); Sept. 19 (2); †Dec. 5 (2).
Franklin—January 24 (2); April 18 (2); October 24 (1).
Wilson—†Feb. 7 (2); †June 6 (1); Oct. 31 (2).
Vance—Feb 21 (2); May 23 (2); Oct. 3 (2).
Martin—March 21 (2); Sept. 5 (2).
Nash—†May 2 (2); Nov. 21 (2).

FOURTH JUDICIAL DISTRICT.

SPRING—Judge E. W. Timberlake.
FALL—Judge Henry R. Bryan.
Wake—*January 10 (2); †Feb. 28 (2); *March 28 (2); †April 25 (2); July 11 (2); *September 26 (2); †Oct 24 (3).
Harnett—February 21 (1); Sept. 5 (1); ‡November 28 (2).
Johnston—March 14 (2); August 29 (1); Nov 14 (2).
Wayne—Jan. 24 (2); April 18 (1); Sept. 12 (2); October 17 (1).

FIFTH JUDICIAL DISTRICT.

Spring—Judge W. S. O'B. Robinson.
Fall—Judge E W. Timberlake.
Durham—Jan. 17 (2); †March 28 (2); *May 16 (1); *Sept. 5 (1); †Oct 3 (2).
Granville—Jan. 31 (2); April 25 (2); July 25 (2), November 21 (2).
Chatham—February 14 (1); May 9 (1); September 19 (2).
Guilford—February 21 (2); June 6 (3); August 22 (2); December 5 (2).
Alamance—March 14 (1); May 23 (1); †Sept. 12 (1); November 7 (1).
Orange—March 21 (1); †May 30 (1); August 8 (1); October 31 (1).
Caswell—April 11 (1); October 17 (1).
Person—April 18 (1); August 15 (1); November 14 (1)

SIXTH JUDICIAL DISTRICT.

Spring--Judge Spencer B. Adams.

Fall—Judge W. S. O'B. Robinson.

New Hanover—†Jan. 24 (1); †April 18 (2); †Sept. 26 (2)

Sampson—Feb. 7 (2); May 2 (1): Oct. 10 (2)

Duplin—February 21 (1); August 1 (1); December 5 (1).

Greene February 28 (1); August 8 (1); November 28 (1).

Pender—March 7 (1); Sept. 12 (2).

Carteret—March 21 (1); Oct. 24 (1).

Jones--March 28 (1). October 31 (1)

Onslow—April 4 (1); Nov. 7 (1)

Lenoir—May 9 (2); Nov. 14 (2).

SEVENTH JUDICIAL DISTRICT.

Spring—Judge Oliver H. Allen.

Fall—Judge Spencer B. Adams.

Anson--*January 10 (1); †April 18 (1); *September 5 (1); †October 31 (1).

Moore—†January 31 (2); *April 4 (1); †April 11 (1); *August 22 (1); †August 29 (1); November 28 (1).

Cumberland—†March 28 (1); †May 9 (2); †November 14 (2).

Robeson—†February 14 (1); †May 2 (1); †December 5 (2).

Richmond—*January 17 (1); †Jan. 24 (1); April 25 (1); *May 23 (1): †May 30 (1); *September 12 (1); †September 19 (1); November 7 (1)

Columbus—March 14 (1); August 15 (1); October 24 (1).

Bladen—March 7, Tuesday (1); Oct 3 Tuesday (2).

Brunswick—March 21 (1); Oct. 17 (1).

EIGHTH JUDICIAL DISTRICT.

Spring—Judge J. D. McIver.

Fall—Judge Oliver H. Allen.

Cabarrus—Jan. 24 (2); July 25 (2).

Iredell—Feb. 7 (2); May 23 (2); Aug. 8 (2). Nov. 7 (1)

Rowan—Feb. 21 (2); May 9 (2); Aug. 22 (2); Nov. 28 (1).

Davidson—March 7 (2); Sept. 5 (2).

Randolph—March 21 (2); July 11 (2); Nov. 21 (1)

Montgomery—Jan. 3 (2); April 18 (1); October 3 (2).

Yadkin—May 2 (1); Oct. 24 (2)

NINTH JUDICIAL DISTRICT.

Spring—Judge Albert L. Coble.

Fall—Judge J. D. McIver

Alexander—January 24 (1); July 18 (1).

Rockingham—January 31 (2); July 25 (1); Oct. 31 (2).

Forsyth—February 21 (2); May 16 (2); August 1 (2); Nov. 28 (2).

Wilkes—March 7 (2); Aug. 29 (2).

Surry—March 21 (2); October 3 (2).

Alleghany—April 4 (1); Sept. 12 (1).

Davie—April 11 (2); Sept. 19 (2).

Stokes—April 25 (2); Oct. 17 (2).

TENTH JUDICIAL DISTRICT.

Spring—Judge H. R. Starbuck.

Fall—Judge Albert L. Coble.

Catawba—Feb 21 (2); July 4 (1); Oct. 31 (2).

McDowell—†March 7 (2); †Sept. 19 (2).

Burke—March 21 (2); Oct. 3 (2)

Caldwell—April 4 (2); Oct. 17 (2).

Ashe—April 25 (1); ‡July 25 (2); Nov. 14 (1).

Watauga—May 2 (1); ‡Aug. 8 (1); Nov. 21 (1).

Mitchell—May 9 (2); Aug. 22 (2); Nov. 28 (1).

Yancey—May 23 (1); Sept. 5 (2).

ELEVENTH JUDICIAL DISTRICT.

Spring—Judge Leander L Green.

Fall—Judge H. R Starbuck

Mecklenburg—†Jan. 24 (1); †March 21 (2). †June 6 (1); †Oct. 3 (2).

Union--*Jan. 31 (1); †Feb. 7 (2); *Aug. 22 (1); †Aug 29 (1).

Gaston—Feb. 21 (2): Sept. 19 (2).

Stanly--March 7 (2); Sept 5 (2).

Lincoln--April 4 (2); Oct. 17 (1).

Cleveland—April 18 (2); Oct. 24 (2).

Rutherford—May 2 (2); Nov. 7 (2).

Polk--May 16 (1); Nov. 21 (1).

Henderson—†May 23 (2): †Nov. 28 (2).

TWELFTH JUDICIAL DISTRICT.

Spring—Judge W A. Hoke.

Fall—Judge Leander L. Greene.

Madison—†Feb. 28 (2); †Aug. 1 (2).

Buncombe—†March 14 (3); Aug. 15 (3); †Dec. 5 (2)

Transylvania--April 4 (1); Sept. 5 (1).

Haywood--†April 11 (2); †Sept. 12 (2).

Jackson—April 25 (2); Sept. 26 (1).

Macon--May 9 (1); October 3 (1).

Clay—May 16 (1); Oct. 10 (1)

Cherokee--May 23 (2); Oct. 17 (2)

Graham—June 6 (1); Nov, 7 (2).

Swain--June 13 (1); Nov. 21 (2).

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* For criminal cases only

† For civil cases only.

‡ For civil cases only, except jail cases.

CRIMINAL COURTS.

Eastern Circuit—Judge Thomas H. Sutton.

New Hanover—Jan. 3d, March 14th, Oct. 10. Warren--January 17, July 11. Nash—January 24th September 12th. Cumberland—February 7th. September 19th. Edgecombe—February 14th, November 7th Craven--February 21st, October 3. Halifax--February 28th, December 5th. Wilson--March 28th, August 22d, Mecklenburg—April 11th, September 5th. Robeson- April 18th, October 17th.

Western Circuit--Judge H. G. Ewart Solicitor for District, R. S McCall.

Haywood—January 10th, July 4. Buncombe--January 24th, April 25th, July 25th, October 24th. Madison--February 21st, June 13th, November 14th. Henderson—April 11th, September 12th. McDowell--July 11th, December 12th.

U. S. CIRCUIT AND DISTRICT COURTS.

The stated terms of the United States Circuit and District Courts are as follows: Eastern District Circuit Court—held at Raleigh on the fourth Monday in May and first Monday in December, and at Wilmington on the first Monday after the fourth Monday in April and October. Charles H. Simonton, circuit judge, Charleston, S. C; Thos. R. Purnell, district judge, Raleigh, N. C;. Charles B. Aycock, United States attorney, Goldsboro, N. C. F. S. Spruill, assistant district attorney, Louisburg, N. C. N. J. Riddick, clerk circuit court of Raleigh and Wilmington. J. B. Fortune, clerk of district court, Raleigh, N. C. Owen J. Carroll, United States marshall, Raleigh, N. C. Vitruvius Royster, deputy clerk, Raleigh, N. C. W. H. Shaw, deputy clerk, Wilmington, N. C.

Eastern District—District Courts—Thomas R. Purnell, United States district judge, Raleigh—held at Elizabeth City, third Monday in April and October. W. C. Brooks, clerk. Newberne, fourth Monday in April and October; George Green, clerk. Wilmington, first Monday after the fourth Monday in April and October.

Western District Circuit and District Courts—Charles H. Simonton, United States circuit judge, Charleston, S. C. Robert P. Dick, United States district judge, Greensboro N. C. Thomas J. Allison, United States marshal, Statesville, N. C. The Circuit and District Courts in the Western district are held at the same time and place, as follows: Greensboro first Monday in April and October; Samuel L. Trogdon, clerk. Statesville, third Monday in April and October; H. C. Cowles, clerk. Charlotte, second Monday in June and December; H. C. Cowles, clerk. Asheville, first Monday in May and November; Robert O. Patterson clerk. A. E. Holton, United States district attorney, Winston, N. C. David A. Covington, assistant United States district attorney, Monroe.

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CITATION OF REPORTS.

Rule 62 of the Supreme Court is as follows:

Inasmuch as many of the volumes of Reports prior to the 63d have been reprinted by the State with the number of the Report instead of the name of the Reporter, and all the other volumes will be reprinted and numbered in like manner, counsel will cite the volumes prior to the 63d as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
				10 " "	"	32	"
1 Haywood	"	2	"	11 " "	"	33	"
2 "	"	3	"	12 " "	"	34	"
1 and 2 Car. Law Repository N.C. Term	"	4	"	13 " "	"	35	"
				1 " Eq.	"	36	"
1 Murphey	"	5	"	2 " "	"	37	"
2 "	"	6	"	3 " "	"	38	"
3 "	"	7	"	4 " "	"	39	"
1 Hawks	"	8	"	5 " "	"	40	"
2 "	"	9	"	6 " "	"	41	"
3 "	"	10	"	7 " "	"	42	"
4 "	"	11	"	8 " "	"	43	"
1 Devereux Law	"	12	"	Busbee Law	"	44	"
2 " "	"	13	"	" Eq.	"	45	"
3 " "	"	14	"	1 Jones Law	"	46	"
4 " "	"	15	"	2 " "	"	47	"
1 " Eq.	"	16	"	3 " "	"	48	"
2 " "	"	17	"	4 " "	"	49	"
1 Dev. & Bat. Law	"	18	"	5 " "	"	50	"
2 " " "	"	19	"	6 " "	"	51	"
3 & 4 " " "	"	20	"	7 " "	"	52	"
1 Dev. & Bat. Eq.	"	21	"	8 " "	"	53	"
2 " " "	"	22	"	1 " Eq.	"	54	"
1 Iredell Law	"	23	"	2 " "	"	55	"
2 " "	"	24	"	3 " "	"	56	"
3 " "	"	25	"	4 " "	"	57	"
4 " "	"	26	"	5 " "	"	58	"
5 " "	"	27	"	6 " "	"	59	"
6 " "	"	28	"	1 and 2 Winston	"	60	"
7 " "	"	29	"	Phillips Law	"	61	"
8 " "	"	30	"	" Equity	"	62	"

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

SEPTEMBER TERM, 1897.

G. W. WARD v. ELIZABETH CITY.

Municipal Corporation—Repeal of Charter—Legislative Office—Abolition of Office—Officer—Hold-over—Right to Salary.

1. The General Assembly may, at its discretion, abolish municipal as well as other corporations.
2. One who accepts an office created by legislative enactment takes it with notice of the power of the Legislature to abolish it and subject to all the provisions of the Act creating the office.
3. The charter of a town provided for the election of a City Attorney who should hold office for one year and until his successor should qualify. W. was elected for one year on May 7, 1894. The General Assembly of 1895 repealed the existing charter and enacted a new charter designating different town limits, adding new territory and population and making other substantial changes and providing for the election of a City Attorney. The Commissioners elected under the new charter at their first meeting in June, 1895, abolished the office of City Attorney and in May, 1896, recreated the office and elected an incumbent other than W. W, whose salary was paid to May, 1895, and who entered no protest to the abolition of the office and rendered no services thereafter, sued for the salary for a year ending May, 1896, upon the ground that he was entitled to the office and emoluments as a hold-over until his successor was elected and qualified which was not done until May, 1896. Held: that the corporation, of

which W. was an officer, having been abolished, he had no right, as a hold over, to the salary of the office in the substantially different corporation, and if he had had any such rights his abandonment of the functions of the office, without protest, was a surrender of his claims.

CIVIL ACTION tried at July, 1897, Special Term of PASQUOTANK Superior Court before *Greene, J.*, and a jury, upon an appeal from the Court of a Justice of the Peace. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

Mr. E. F. Aydlett, for plaintiff, (appellant).
Mr. Issac M. Meekins, for defendant.

CLARK, J.: The charter of Elizabeth City, Chapter 126, Private Laws, 1889, provided (Section 12) among the officers to be elected by the Board of Commissioners "a City Attorney who shall hold office one year and until his successor qualify." The plaintiff was elected City Attorney for one year at the meeting of the Board, May 7th, 1894.

By Chapter 85, Private Laws, 1895, the charter of Elizabeth City was repealed and a new charter, with different town limits adding 1,000 population and making other substantial changes, was enacted. Section 19 thereof provides for the election of sundry officers by the board, among them a City Attorney. The Board elected under the new charter met on June 3, 1895, and passed a resolution abolishing the office of City Attorney. The plaintiff was paid up to that date. No City Attorney was elected till May, 1896. The plaintiff rendered no services as City Attorney after the action of the Board in June, 1895. He began this action on the 7th of May, 1897, to recover his salary from June, 1895, till May, 1896, ($45.83) upon the ground that, though the term of one year for which he was elected had expired, he was further entitled to hold "till his successor was qualified" and as no successor was elected and qualified till May, 1896, he was entitled to draw his salary till that date. This contention overlooks the fact that the corporation for which he was elected was absolutely abolished by the Legislature. The Legislature at its discretion can abolish Counties, *Mills* v. *Williams*, 33 N. C., 558, and of course cities and towns, *Lilly* v. *Taylor*, 88 N. C., 489, *Merriwether* v. *Garrett*, 102 U. S., 472; and also all other corporations, Const. Art. VII, Sec. 12 and Art. VIII, Sec. 1, since they are all alike creatures of its will, and exist only at its pleasure. The destruction of the corporation destroyed the "hold-over" incident of the plaintiff's office just as fully as it would have destroyed the body of his office, if his term had not expired. The City Attorney authorized for the new corporation is an entirely distinct office from, and is not a continuation of, the office of City Attorney of the corporation which was extinguished by the Act of the Legislature. This case differs from *Wood* v. *Bellamy*, 120 N. C., 212, in that, there, the new charter was so nearly a repetition of the old one that it was held to be merely an amendment of the former one, not a destruction of it, and hence the offices under such charter were not vacated. Every one who accepts an office created by legislative enactment takes it with notice that the Legislature has power to abolish his office and is fixed with acceptance of all provisions in the Act creating the office. *McDonald* v. *Morrow*, 119 N. C., 666 (top of page 677). The only restriction upon the legislative power is that after the officer has accepted office upon the terms specified in the Act creating the office, this being a contract between him and the State, the Legislature cannot turn him out by an Act purporting to abolish the office but which in effect continues the same office in existence. This is on the ground that an office is a contract between the officer and the State, as was held in *Hoke* v. *Henderson*, 15 N. C., 1, and has ever since been followed in North Carolina down to and including *Wood*

v. *Bellamy*, *supra*, though this State is the only one of the 45 States of the Union which sustains that doctrine. *Mechem on Public Officers*, Sec. 463. In the other States, it is held that public office is not a contract but that the officer is an agent of the government, and being the mere creation of law is (except as to offices created by the Constitution) not protected by the terms of the statute creating the office, 19 *Am. and Eng. Enc.* 562 c. Even under our decisions, the plaintiff who was City Attorney under an abolished corporation has no claim to the salary of City Attorney in a substantially different corporation created by the General Assembly, though it embraces the whole of the territory and population contained in the former corporation, much more being added to the new corporation.

We believe this is the first time it has been attempted to extend the doctrine of *Hoke* v. *Henderson* to "hold-overs." Their right is not a part of the term of office but a constructive addition thereto. Besides, the plaintiff abandoned his functions after the new Board took charge, and rendered no service thereafter, and entered no protest. This was a surrender of his rights, if he had had any, and on that ground also this action could not be maintained. *Williams* v. *Somers*, 18 N. C., 61.

No error.

A. AYDLETT v. ELIZABETH CITY.

Municipal Authority—Impounding Cattle—Sale of Impounded Cattle for Cost of Feeding.

1. Where a town ordinance made it the duty of the town constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited the authorities from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents. *Held*, that a sale of an

impounded cow, belonging to a non-resident, for the cost of feeding her while impounded, was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the word "poundage or penalty."

2. When the purchaser, in such case, surrendered the cow to the true owner, he cannot recover from the town authorities the amount which he bid and paid for the cow at the sale.

CIVIL ACTION tried before *Greene, J.:* at July, 1897, Special Term of PASQUOTANK Superior Court, on appeal from a judgment of a Justice of the Peace. The facts were agreed to and were as follows:

"That E. F. Aydlett owned a farm about four miles from Elizabeth City and had upon the farm among other things a lot of cattle, all of which property and farm was in the possession of J. B. Sylvester, who was in charge of the farm and the stock; that E. F. Aydlett, who lives in Elizabeth City, did not look after the stock in any way, and did not know all the stock, and especially did not know the cow that was taken up by the defendant and sold. That the cow was on the farm in the possession of J. B. Sylvester, and got out and strayed in the Corporate limits of Elizabeth City, into the garden of —— Dozier, who drove her out and drove her in the streets being the first time seen by the town authorities on the streets, and being the first time taken: That the town authorities took the cow up from the street and placed her in a lot kept for cattle taken up by the town. The defendant kept her for 10 days, advertised her and sold her at the Court House door according to the town ordinances made for the Corporation of Elizabeth City, which ordinance is made a part of this statement, and at the sale A. Aydlett bid for the cow $5.00, which was the last and best bid, and paid the money for her to the defendant, and the cow was delivered to said A. Aydlett.

That E. F. Aydlett afterwards claimed and proved the cow to be his and took possession of her. The town authorities have offered to pay E. F. Aydlett the difference between $5.00 and what it cost to feed the cow for the 10 days and the fees of the Constable, which he declined and claimed the cow.

The plaintiff presented his bill demanding the $5.00 to the Board of Commissioners of the defendant before the commencement of this action, and asked to have it audited and allowed, and the Commissioners refused to do so.

The town ordinance referred to is as follows:

Town Ordinance—Sec. 6.

"No cow, ox, sheep, goat, hog, horse, mule, or goose shall be allowed to run at large in any of the streets or on any of the unenclosed lots of the town within the Corporate limits. It shall be the duty of the Constable to take up and impound any such animal or goose so at large until the penalty or fine and costs for such taking, keeping and impounding shall be paid by the owner or claimant. There shall be paid for each goose so impounded or found running at large the sum of twenty-five cents, and for each cow, ox, sheep, goat, hog, horse or mule, one dollar. One-half of said fine shall go to the Constable and the other half to the Corporation. *Provided*: That if one week after any of said animals shall have been impounded, no claimant shall appear and pay the fine and costs of keeping, the same shall be sold, after three days advertising by the Constable at the Court House door, to the highest bidder for cash. Proceeds of sale shall be applied to the payment of fines and costs of keeping, and one dollar to the Constable for making and posting the advertisement, excess, if any there be, shall be paid to the Treasurer of the Corporation."

The defendant put in evidence the private laws of 1885, Chapter 15, Private laws of 1889, Chapter 126, and also Private laws of 1895, Chapter 85, showing the charter and amended charter of Elizabeth City.

His Honor held that the plaintiff was not entitled to recover and gave judgment accordingly from which the plaintiff appealed.

Mr. E. F. Aydlett, for plaintiff, (appellant).
Mr. Isaac M. Meekins, for defendant.

MONTGOMERY, J.: The plaintiff acquired a good title to the cow at the sale made by the town authorities. If the plaintiff's contention that the animal belonged to a non-resident of the town, who lived four miles away, and that the owner could not under Section 2 of Chapter 141 of the Acts of 1895 be made to pay any poundage or penalty for the first three times of impounding should be conceded to be true the cow certainly could have been sold under the town ordinance for the cost of feeding her while impounded. The charges for feeding can not, under the Act referred to, be embraced in the words "pounding or penalty." It was the duty of the town Constable to impound all cattle running at large within the town limits. The Section and Act referred to do not prohibit the town authorities from impounding the cattle of all persons, non-residents of the town as well as residents, found astray within the corporate limits; it only prohibits the charging of fines and poundage in cases where the animals belonged to non-residents of the town who live a mile or more from the corporation limits. It does not attempt to prevent the town authorities from collecting the cost of feeding stock impounded, in all cases. There was due to the town authorities from the owner the cost of feeding the animal for ten days, and the amount so due entered into the sale and was sufficient inducement to justify and authorize the authorities to make the sale.

But suppose the town officer acted without authority in making the sale, the plaintiff in this case, who was the purchaser, acquired no title and the true owner had a right to the possession of the animal and the plaintiff did what was proper in surrendering it to him. At such sales made by public officers the purchaser is charged with notice of all defects of title and of all such gross irregularities as amount to a lack of authority to sell. The plaintiff paid the bid for the cow and took possession of her under the sale. The town is liable to him for nothing. If he has any remedy it is not against the town.

No error.

LIZZIE O'K. BROWN v. J. R. BROWN.

Action for Damages—Husband and Wife—Free Trader —Right of Wife abandoned by Husband to Maintain action in Tort Without Joinder of Husband.

Under a reasonable construction of the Constitution and section 1832 of The Code, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. (Furches, J., dissenting.)

CIVIL ACTION heard on complaint and demurrer before *Bryan, J.*, at Spring Term, 1897, of PASQUOTANK Superior Court.

The action was brought by the plaintiff, Lizzie Brown, wife of J. W. Brown, in her own name against the defendant J. R. Brown, the father of her busband. The complaint alleged that the defendant had alienated the affections of her husband and induced him to abandon her and to refuse to contribute anything for her support.

The complaint also contained, as second and third causes of action, allegations that defendant had defamed her character and injured her reputation by maliciously swearing out a warrant against her for assault upon her husband and for causing a disturbance, of which charges she was acquitted, and that defendant had unlawfully caused her arrest and imprisonment. Plaintiff claimed fifteen thousand dollars damages.

The defendant demurred upon the ground that there was a defect of parties plaintiff for that it appeared on the face of said complaint that plaintiff was a married woman, the wife of James W. Brown, who did not join with her in the action, and that it did not appear that the action concerned her separate property or that it was an action between her and her husband, or that she was a free trader.

The demurrer was sustained and an order made allowing plaintiff to amend the summons by making other parties and to amend her complaint.

From the judgment sustaining the demurrer the plaintiff appealed.

Mr. E. F. Aydlett, for plaintiff (appellant).

Messrs. G. W. Ward and *Shepherd & Busbee*, for defendant.

FAIRCLOTH, C. J. The sole question presented is whether a married woman, being abandoned by her husband, can maintain an action in her own name for a tort. This question has not been heretofore decided by this court. The case is here upon complaint and demurrer and the allegations of the complaint are at present taken as true.

The complaint alleges that the defendant, who is the father of her husband, has, by persuasion and numerous wilful and unlawful acts, caused her husband to wholly abandon and neglect her, to her great damage, &c. The demurrer is grounded on a denial of her right to maintain this action in her own name without the joinder of her husband.

The disabilities of married women at common law still exist, as to their person and property, except to the extent of changes by legislation in express terms or by reasonable construction of the same. These changes tend to relax the common law rules and must receive a reasonable construction in the spirit of their enactment. Our Constitution and statutes have made very material and important changes in the status of married women in this State, by extending protection to their person and separate property and allowing them the privilege of free traders, suing in their own names &c., in certain conditions. *The Code* 1832 declares that every woman whose husband shall abandon her "shall be deemed a free trader . . . . so far as to be competent to contract and be contracted with" &c. and this section has been held to be constitutional. *Hall* v. *Walker*, 118 N. C., 377.

These privileges as well as those found in *The Code* 178, necessarily imply responsibilities and liabilities in certain cases.

Finley v. *Saunders*, 98 N. C., 462, was an action for possession of land against a wife, whose husband had abandoned her, and it was held upon good authorities that the action could be maintained against her alone.

Heath v. *Morgan*, 117 N. C., 504, was an action for personal property unlawfully withheld by the wife, whose husband had abandoned her and could not be served with process, and it was held that the non-joinder of the husband was no defence. If a wife, then, whose husband has abandoned her, be sued in tort, she may set up a counter-claim for any damages arising out of the same "transaction", disclosed in the complaint, and if her damages exceed those of the complaint she is entitled to a judgment for the excess. *Code* 244; *Bitting* v. *Thaxton*, 72 N. C., 541; *McKinnon* v. *Morrison*, 104 N. C., 354.

If, then, she can recover damages by way of counterclaim, which is only her cross action, we fail to see why she cannot do so by direct action. Upon these cases, and upon reason, we think she is entitled to prosecute her claim in this action.

Error.

Furches, J., dissenting:—I do not agree with my brethren. At common law the plaintiff could not have brought and maintained this action. *Pippin* v. *Wesson*, 74 N. C., 437. It is admitted in the opinion of the court that the common law disabilities still exist, unless they have been removed by legislation. Section 1832 of *The Code* was cited and is relied on, as making the change that authorized this action, but this section provides that in cases where the wife is abandoned by her husband, she "shall be deemed a free trader so far as to be competent to contract and be contracted with, and to bind her separate property". To make this section apply, the action must be upon contract, express or implied, or for a tort growing out of contract or connected with her separate property or for the recovery of her separate property. And I submit that this action is for neither.

Hall v. *Walker*, 118 N. C., 377, holds that section 1832 of *The Code* is constitutional, and no more. It puts no construction upon this section.

Finley v. *Saunders*, 98 N. C., 462, was an action for land, and *Heath* v. *Morgan*, 117 N. C., 504, was an action for personal property, and I submit have no bearing upon this action.

Bitting v. *Thornton*, 72 N. C., 541 and *McKinnon* v. *Morrison*, 104 N. C., 354, only established the fact that a defendant, who is entitled to an action against the plaintiff, may set up his right of action by way of counter-claim in those cases provided for by statute. They do not apply in this case, because the plaintiff has no right of action.

I am forced to this conclusion by reasoning from common law principles, and I am sustained in this conclusion by authority. *9 Am. & Eng. Enc. of Law*, 834 Note 8, 9; *VanArnam* v. *Ayers*, 67 Barb. (N. Y.) 544; *Westlake* v. *Westlkae*, 34 Ohio St., 621. For these reasons and upon these authorities I am of opinion the action cannot be maintained.

ELIZABETH CITY COTTON MILLS v. W. E. DUNSTAN.

Corporation—Subscription to Stock—Liability of Delinquent Subscriber—"By", Meaning of as a Designation of Time.

1. When used to designate a terminal point of time the word "by" means "not later than"; hence, a condition affixed to a subscription to the capital stock of a corporation that a certain amount should be subscribed for "by July 1st" was fulfilled by the total subscriptions reaching such amount on the night of July 1st.

2. Under Section 664 of *The Code*, a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments.

3. Where the by laws of a corporation provided that if any stock holder should fail to pay his installments when called by the directors for two months, the stock should be declared forfeited and sold for account of the delinquent, publicly after thirty days notice, and that the proceeds of such sale should be applied to the payment of the amount due on the subscription and the balance, if any, should be paid to the delinquent but that such forfeiture and sale should not relieve the delinquent from his original subscription; *Held*, that such by-law was a reasonable one and the subscriber whose stock was duly declared forfeited and sold for less than its face value can be required to pay the difference between his subscription and the amount for wheih it was sold.

CIVIL ACTION tried, on appeal from the judgment of a Justice of the Peace, before *Greene, J.*, and a Jury at July, 1897, Special Term of PASQUOTANK Superior Court. The action was for $200.00, the difference between the amount of defendant's subscription to the stock of plaintiff corporation and the amount for which the stock sold after having been declared forfeited according to the by-laws of the Company.

The only issue submitted on the trial was,

"Is the defendant indebted to the plaintiff, and if so in what sum?"

It was admitted that the plaintiff was duly incorporated and organized, and had a regularly elected, qualified and acting Board of Directors. Dr. O. McMullan, witness for plaintiff, testified: "I am president of E. City Cotton Mills. $80,000,00 were subscribed on July 1st, 1895. Subscription was completed on the night of July 1st, 1895. Mr. Dunstan has not paid the amount of his subscription to my knowledge. Mr. Bradford was directed to make call. The call was made to my knowledge. I saw the form of the notice. He exhibited them each time. It called for payment. We notified delinquents from month to month. We did not sell any stock until all was due. We then advertised according to by-law and sold at Court House door. We declared the stock forfeited before advertisement and sale in regular meeting of the Board of Directors according to section 25 of our by-laws. Dunstan's stock sold for $300.00. Balance due from him $200.00. Mr. Bradford made demand. Dunstan subscribed before incorporation or organization. $80,000.00 made up on night of July 1st, 1895. It was not made up on the morning of July 1st, 1895. There was no subscription in excess of $80,000.00."

The subscription agreement signed by the defendant (who agreed to take five shares of stock) was as follows:

"We, the undersigned, mutually agree with each other that we will take and pay for the number of shares opposite our names hereby subscribed as stock in a Cotton Factory to be erected in or near Elizabeth City, N. C., and to pay for each share of stock the sum of One Hundred Dollars as follows: 5 per cent. when temporary organization is made, 5 per cent. in thirty days thereafter, and balance in monthly installments of not more than 10 per cent., provided this shall not be binding unless $80,000.00 is subscribed by July 1st, 1895."

Section 25 of the by-laws of the Company was as follows:

"If any stockholder shall fail to pay his installment when called by the Board of Directors for two months, the stock of such delinquent may be declared forfeited by the Board of Directors and sold for account of such delinquent, publicly, after thirty day's notice, and the net proceeds of such sale be applied first to the payment of all amounts due upon such stock and the balance, if any, paid to delinquent; Provided, however, that the forfeiture and sale of the stock of any delinquent shall not release him from his original subscription; and such delinquent shall forfeit his right to vote at all meetings of stockholders. And no subscriber shall be entitled to vote at any meeting of the stockholders until he shall pay at least one assessment."

D. B. Bradford, for plaintiff, testified: "I was Secretary and Treasurer of the Elizabeth City Cotton Mills from July 1, 1895, to December, 1896. Then I gave up Treasurer's place. Dunston's subscription was handed me. I sent him notices just as I did the others each month. The notices were mailed. The sale of this stock at the courthouse door was advertised and sold according to By-Laws. Mr. Dunstan's stock was bought by Mr. T. G. Skinner. He paid the money and I issued the stock. Skinner did not buy for company. Sale was bona fide."

Defendant, for himself, testified as follows: "I do not know that J. A. Temple was solvent at the time of his subscription. I am defendant. I was present in courthouse on night of July 1st, 1895, only as a citizen. The house was one-third or one-half full of people. Plenty who did not subscribe. I do not think I voted on any question that night. I left before the organization. I usually retire early. Have paid nothing on stock. Have never attended any meeting. Received By-Laws eleven days after sale of my stock. I never saw my stock advertised. I examined the bulletin board when it was organized and never saw my name. I was here. I don't think I was present when it was announced that $80,000.00 had been subscribed.

D. B. Bradford recalled by defendant, testified: "I do not know as to the solvency of all the subscribers to the $80,000.00 capital stock of plaintiff company. Some have paid and some have not paid. Some who subscribed and have paid are insolvent and some who subscribed and have not paid are insolvent."

Defendant requested the court to charge the jury as follows:

1. If you find from the evidence that plaintiff forfeited and sold the stock of defendant in accordance with Section 25 of its By-Laws, then you will answer the issue, NO.

2. Upon all the evidence the court instructs you to answer the issue, NO.

3. If you find from the evidence that the full amount of $80,000.00 stock was not subscribed until the night of July 1st, 1895, then $80,000.00 was not subscribed by July 1st, 1895, and you will answer the issue, NO.

His Honor declined to so instruct the jury and charged that if they believed all the evidence they would answer the issue $200.00. The jury returned a verdict for $200.00 and costs of action and from the judgment thereon defendant appealed.

Mr. G. W. Ward, for plaintiff.

No counsel for appellant.

CLARK, J.: The agreement was that the subscription was not to be binding unless the sum of $80,000 was subscribed "by July 1." The full amount named was subscribed at the meeting held on the night of July 1. This was a performance of the condition. "By" has many significations, but when used to designate a terminal point of time it is defined by the Century Dictionary to mean "not later than," "as early as." The Standard defines it "not later than," and Webster "not later than," "as soon as." The condition therefore, "by July 1" meant that the whole amount should be subscribed "not later than" July 1. It has been held that a bill or note for the payment of money "by November 1" is due on that day, *Preston* v. *Dunham*, 52 Ala. 217; *Randolph on Com. Paper*, Section 110. A note payable "by 20th of May" is due on that day, *Stevens* v. *Blount*, 7 Mass., 240; 1 *Daniel Neg. Inst.*, Sec. 43. In like manner a promise to pay "against 25th of December" is due on that day, *Goodloe* v. *Taylor*, 10 N. C., 458. A note payable "on or by" a certain day is payable on that day, *Massie* v. *Belford*, 68 111, 298. A contract to deliver "900 bushels of barley by November 1," is performed by its delivery on or before that day. *Coonley* v. *Anderson*, 1 Hill N. Y., 519.

The evidence is uncontradicted that the stock was duly advertised and sold in accordance with the terms of the company's by-laws, notice first having been sent the defendant by mail, who admits receipt. His denial of having seen the advertisement has no bearing. It is true that, in the absence of statutory authority, the power to declare stock forfeited for non-payment of assessments is not inherent in a corporation (23 *Am. & Eng. Enc.*, 818), but *The Code*, Sec. 664, empowers corporations to provide by their by-laws, *inter alia*, "the mode of selling shares for non-payment of assessments." The by-law in this case is a reasonable one. The defendant has been unfortunate but he has no valid ground of objection to the proceeding by which he has both lost his stock and been adjudged to pay the difference between his subscription and the price for which the stock was sold. He would have avoided all loss, if he had paid for his stock according to the terms of his subscription. The other stockholders had a right to hold him to his contract. If this were not so, all corporate enterprises would fail in the beginning.

No error.

F. M. COOK v. GUIRKIN & CO.

Action to Cancel Note—Trial—Issue—Verdict of Jury —Meaning of.

In the trial of an action brought by plaintiff to restrain the sale of lands under a mortgage securing a note and for cancellation of the note, the allegation was that the note had been paid by the proceeds of the sale of bonds lodged with the defendants as collateral for the note and other indebtedness and that there was a balance due the plaintiff after the payment of all his indebtedness. The answer denied that plaintiff's note had been paid except to the extent of a small amount for which credit had been given and the defendants had accounted to plaintiff for the bonds held as collateral. The issues submitted were, "Has the note of $464.60 described in the complaint been paid?" and "what amount is due plaintiff from defendant?" The jury found that the note had not been paid and that the defendants owed the plaintiffs a certain sum. *Held*, that the response to the second issue could mean nothing else than that the amount was due as a balance, principal and interest, by the defendants to the plaintiff on the day of trial after the payment of the other debts for which the bonds were hypothecated and judgment was properly rendered in favor of the defendants for the difference between the amount of the notes, principal and interest on the day of trial, and the amount due by defendants to plaintiff as found by the jury.

CIVIL ACTION tried before *Bryan, J.*, and a Jury at Spring Term, 1897, of PASQUOTANK Superior Court. There was judgment for the defendants and plaintiff appealed. The facts appear in the opinion of the Court.

Messrs. E. F. Aydlett and *G. W. Ward*, for plaintiff (appellant).

No counsel *contra.*

MONTGOMERY, J.: The plaintiff, in his complaint for first cause of action, alleged that the defendants were about to have sold through the trustee, a tract of land under the power contained in a deed of trust made by him and his wife to C. Guirkin to secure plaintiff's note of $464.60 payable to the defendants, notwithstanding that the note had been paid in full by the plaintiff to the defendants. The plaintiff for a second cause of action alleged that he had placed in the hands of the defendants County Bonds with coupons attached of the value of more than $1,500, as a collateral security for his note, and other matters; that the defendants had collected the money on the bonds and coupons but had failed to account with him for the same, and that they owed him $500, as a balance, after all the indebtedness for which the bonds had been hypothecated had been paid. The prayer of the plaintiff was—

1. That the defendants be restrained from having a sale made of his property by the trustee.
2. For an account.
3. For the cancellation of his note and mortgage.
4. For $500, or whatever amount should be found due plaintiff, and interest on the same.

The defendants in their answer deny that payment of the plaintiff's note to them had been made, except to the amount of $27.78 on December 31, 1888, and they aver that they had accounted with the plaintiff for the County Bonds and coupons placed in their hands by the plaintiff, and that they owed him nothing on that account. The issues were—

1. Has the note of $464.60, described in the complaint been paid?

2. What amount is due plaintiff from defendant?

The last issue is not as clear as it might have been made but, when read carefully in connection with the pleadings, appears clear. The two matters to be settled between the parties, were, first, had the plaintiff's note to the defendants been paid? Second, What, if anything, did the defendants owe the plaintiff on account of the collection of the plaintiff's County Bonds and coupons? The jury found that the note of the plaintiff to the defendants had not been paid, and that the defendants owed the plaintiff $484. Upon the pleadings the response to the second issue could mean nothing else than that the amount was due as a balance, principal and interest, by the defendants to the plaintiff on the day of trial, after the payment of the debts for which the County Bonds had been hypothecated. It could not, as the plaintiff's counsel contended here, mean that the amount was due when the County Bonds and coupons were collected by the defendants. It must be presumed that the verdict of the jury spoke as of the day of trial.

The difference, then, between the amount of the note, principal and interest, on the day of the trial and $484, the amount due by defendants to plaintiff as found by the jury, is the amount to which the defendants are entitled to judgment, and for which amount His Honor rendered the judgment.

No error.

A. L. PENDLETON v. ELECTRIC LIGHT COMPANY.

Contract—Consideration—Breach of Contract—Cause of Action.

1. Where parties to a contemplated litigation agreed that the disputed matters should be submitted to and heard by the Judge at the next ensuing Term of the Superior Court upon complaint, answer and the evidence, without summons being issued, and that his judgment on such hearing should be final and that either party failing to comply with such agreement should forfeit and pay to the other an agreed sum which might be sued for and recovered at any time after refusal to comply with such agreement; *Held*, that such contract was not illegal or against public policy and was founded upon good and sufficient consideration, so that its violation gave a right of action against the party in default for the whole of the sum agreed upon as liquidated damages.

2. The failure of the plaintiff in such contemplated action to take any steps toward bringing the matter to a hearing at the appointed term of Court, except a motion to file his complaint made late in the afternoon of the last day of the Term and just as the Judge was preparing to leave the bench, was not a compliance with the terms of the agreement, under which the adverse party had the right to expect that the complaint would be filed regularly and in good time and that the trial of the matter would be in the Court House and in the usual hours of business.

CIVIL ACTION tried at July, 1897 special Term, of PASQUOTANK Superior Court, before *Greene, J.*, and a jury. There was a verdict for the plaintiff and from the judgment thereon defendant appealed.

Mr. E. F. Aydlett, for defendant (appellant).

Messrs. I. M. Meekins and *Shepherd & Busbee*, for plaintiff.

MONTGOMERY, J.: The plaintiff and the defendants had a matter in controversy and in order that it might be expeditiously and inexpensively adjusted and settled, they entered into the following agreement: "It is mutually agreed by both parties that the question involving the ownership of the Electric Light Fixtures in the hotel Arlington, which were placed there by said Electric Light Co. for the Goode Bros. shall be submitted to the Judge at the next term of the Superior Court of Pasquotank County; that a jury trial shall be waived, and the Judge shall hear the case upon the complaint and answer and the evidence, without summons being issued, and his judgment shall be final. Either party failing to comply with this contract shall forfeit and pay to the other the sum of $100, and the said forfeiture may be recovered against the party so failing to comply at any time after the refusal to comply."

The contract is not illegal; it is not against public policy. Is it, though, founded on a consideration good and sufficient so as to give either party upon a violation of it a right of action against the other? We are of the opinion that it is. It was undoubtedly for the benefit of both parties that the question between them should be heard by a court of competent jurisdiction at the very earliest day possible, that the harrassment and worry of a law suit should be ended and the expense should be reduced to the lowest possible amount.

This is the construction of the contract though the benefits are not expressly cited therein; and also it was stipulated that the contemplated litigation should end with the decision of the Judge of the Superior Court—that his decision should be final. The costs of the original process both as to issue and service were to be saved, and the matter was to be heard at a term of the court earlier than that in which causes are tried in the usual course of the courts. The defendants did not set up as a defence that the forfeiture set out in the contract was either unjust or disproportionate to the damage sustained by the plaintiff by reason of the violation of the contract by the defendant, and as it was liquidated the defendant is bound for the whole amount if it should turn out that it has not complied with the contract.

The testimony introduced by the defendant in this action, the plaintiff in the contemplated one, is in substance that after the whole of the business of the court at its March term, 1897, at which term the matter was to be heard, had been finished and the Judge was about to leave the bench, at five o'clock on Saturday afternoon, the counsel of defendant in this suit (the plaintiff in the other) for the first time made a motion to file the complaint. There was no entry of record concerning the motion, and the testimony as to what the Judge said in reply to the motion, and as to whether or not he would hear the case in his room after supper, was conflicting. However that may have been, we are of the opinion that the offer to file the complaint under all the circumstances as shown by the testimony introduced by defendant was not a compliance on the part of defendant with the terms of the contract. The plaintiff in this action as a matter of law under the contract had a right to expect that the complaint in the other matter certainly would have been filed within such time as would give him a reasonable time and opportunity in which to read it and to file his answer and prepare for the hearing of the case.

The agreement was made nearly three months before the March Court, at which the matter was to be heard. The plaintiff in this action—the defendant in that—was not compelled to file his answer and go into the trial of the case within the limited time left him by the defendant. It was not to be understood by the agreement that he should be hurried into the trial in the manner proposed by the plaintiff without having the opportunity to see the complaint until the last day of the term, at an hour near sunset, after the whole business of the court had been dispatched and after the Judge had left the bench. The plaintiff had a right under his agreement to expect that the complaint would have been filed regularly and in good time, and that the trial of the matter would be in the court house and in the usual hours of business.

With these views it becomes unnecessary to examine either the defendant's exceptions to His Honor's charge or those made for his failure to give the special instruction of the defendant.

No error.

W. H. BASNIGHT v. B. F. MEEKINS.

Proceeding to Establish Boundaries—Possession—Constructive Possession—Evidence.

1. Actual possession of one tract of land does not give constructive possession of an adjoining tract separated from the other by distinct lines and boundaries
2. Where, in the trial of proceedings to establish boundaries, under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession, but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff

Proceedings to settle a disputed boundary of land tried before *Bryan*, *J.*, and a jury, at Spring Term, 1897, of DARE Superior Court, on appeal from the judgment of the Clerk of the Superior Court. There was a verdict for the defendant and from the judgment thereon plaintiff appealed.

Messrs. J. W. Hinsdale and *B. G. Crisp*, for plaintiff (appelant).

Mr. E. F. Aydlett for defendant.

FURCHES, J.: This is a proceeding commenced under chapter 22, Acts of 1893, for the purpose of locating and establishing the lines between the lands of plaintiff and those of defendants.

Plaintiff claims title directly under a deed from J. W. Albertson, trustee, dated April the 6th, 1894. The description of the lands contained in this deed are as follows: "Beginning at the sound on S. A. Baum's line, and running along said line to a post in the land; thence a straight line to a certain ditch; thence along said ditch, at the corner of the ditch, to Dalby's line; thence along said line to the sound, thence along the sound to the first station: containing, by estimation, fifty (50) acres more or less. Also, all my right, title and interest in and to the marsh land adjoining said tract, containing, by estimation, twenty-five (25) acres more or less, together with all my right, title and interest in and to the balance of the one hundred and fifty acres formerly held by Stephen Barnett and Stephen Casey, the whole tract containing one hundred acres, more or less, of high land, and twenty-five acres of marsh land."

The description contained in the deed of Stephen B. Casey to James L. Barnett is as follows: "A certain piece or parcel of land lying on Roanoke Island, joining the lands of Solomon A. Baum, known as the Daniel Baum land, containing seventy-five acres, more or less." And the deed from Stephen Barnett to F. A. Porter contains the following description: "A certain tract or parcel of land on Roanoke Island, being the half of the tract bought by me and Stephen B. Casey of John Etheridge, it being the tract I now reside on, binding the sound, containing fifty acres, more or less, as will appear by the deed of division, 28th of July, from Stephen B. Casey to me, bounded as follows: Beginning at the sound in S. A. Baum's line, thence said line to a post in the line, thence a straight line to a certain ditch, thence said ditch, at the corner of the ditch, to Dalby's line, thence said line to the sound, thence along the sound to first station, containing, by estimation, fifty acres, more or less. I also sell and convey at the same time to the said F. S. Procter and his heirs forever all my right and title to the marsh land adjoining the aforesaid tract containing, by estimation, twenty-five acres, more or less. I sell and convey to the said Procter and his heirs, forever, all my right and title in the balance of the one hundred and fifty acres held by me and Stephen Casey, the whole tract containing one hundred acres, more or less, of high land and twenty-five of marsh land."

The plaintiff resides upon the land included in the first boundary contained in his deed, the fifty acre tract, and he has no possession outside of this boundary, unless the possession of this fifty acres gives him a constructive possession of the other lands claimed by him. He says in his testimony that he has no possession outside of this boundary and does not claim to have. But it is claimed for the plaintiff that he meant by this that he had not the actual possession—*possessio pedis*—and it seems to us that this construction of his evidence would only be fair to him.

This Act was intended to take the place of Chapter 48 of *The Code*, which it repeals. It is a new mode of processioning land. It provides that the owners of land may have the benefit of this statute; and it provides that "occupation" shall constitute sufficient ownership to entitle the party to the benefit of this Act. We suppose the word "occupation" is used in the sense of possession. To give it this meaning is more favorable to the claimant than "occupy." It is more comprehensive and in conformity with legal parlance.

There is but one exception presented by the record, and that is to the charge of the court upon the first issue, to-wit:

"Are the lines on the map, beginning at blue G, thence to blue F, thence to red B, thence to red C, thence to blue

G, the true boundary lines between the lands of the plaintiff and the lands of the defendants?" The burden of this issue was upon the plaintiff.

The Court was asked to charge the jury that if they believed all the evidence they should find this issue "no." The Court gave this instruction and the plaintiff excepted. The boundary designated in the issue did not only cover the fifty acre tract, upon which plaintiff resides, but also a large body of land outside of the fifty acre boundary. He had no possession of any land outside of the fifty acre boundary, unless it be a constructive possession arising from the fact that he was in the actual possession of the fifty-acre boundary. This he could not have, as the fifty-acre tract was separated from the other lands, claimed by the plaintiff, by distinct lines and boundaries. *Loftin* v. *Cobb*, 46 N. C., 406. This being so, the plaintiff could not maintain his action upon the ground of possession. And to entitle him to do so, he must rely upon his title. In this he utterly failed. He showed no title out of the State. He failed to connect his title with Barnett and Casey. He failed to show possession by himself, or any one else, of the land claimed outside of the fifty-acre boundary. Indeed, the descriptions given of the land, claimed by the plaintiff outside of the fifty-acre tract, are so indefinite, vague and uncertain, as to make them incapable of being located. We therefore fail to see error in this ruling of the Court, and the judgment must be affirmed.

There was some question made as to the costs. And if that question is properly before us now, we see no error in this respect, as the plaintiff utterly failed to establish his contention, and both issues were found against him.

Affirmed.

LOVEY NICHOLSON v. COMMISSIONERS OF DARE COUNTY.

Action for Mandamus—Municipal Corporation—Notice under Section 757 of the Code—Practice.

When a judgment has been obtained against a County or other Municipal Corporation, it is not necessary that notice as required in certain cases by Section 757 of *The Code* should be given before bringing an action for mandamus to compel the payment of the judgment.

CIVIL ACTION for *mandamus* tried at Spring Term, 1897, of CURRITUCK Superior Court before *Bryan, J.*, on complaint and demurrer. The defendant demurred *ore tenus* to the complaint, and moved to dismiss the action upon the ground that the complaint did not contain facts sufficient to constitute a cause of action, in that it did not contain the allegations required in section 757 of *The Code* of North Carolina. The Court sustained the demurrer, and said the action should be dismissed. Before the judgment dismissing the same was signed, the plaintiff asked leave to amend, so as to embrace the language of Section 757 of *The Code.* The Court refused to allow the amendment and signed the judgment sustaining the demurrer and dismissing the action. From this judgment the plaintiff appealed.

Mr. W. B. Shaw, for plaintiff (appellant).
Mr. E. F. Aydlett, for defendant.

FURCHES, J.: This is an action of mandamus to enforce the payment of a judgment of the County of Currituck against the County of Dare, which judgment, the plaintiff alleges in her complaint, has been assigned to her and that she is the owner thereof. These allegations were denied by defendant's answer, and this court has twice held that the plaintiff's testimony failed to show that she was the assignee and owner of this judgment. 119 N. C., 20, and 118 N. C., 30.

But when the case came on for trial at Spring Term, 1897, the defendant abandoned its answer and demurred *ore tenus* to the complaint; and assigned as grounds of demurrer that plaintiff had not complied literally with the terms of Section 757 of *The Code* in making demand before bringing suit. And it seems from the authorities cited that this objection would be fatal to the plaintiff's action if it is a case requiring a demand before bringing suit. The defendant relies on *Shields* v. *Durham*, 118 N. C., 450, as authority for demurring at this time and in this way; while the plaintiff cites and relies on *Shields* v. *Durham*, *supra*, *Sheldon* v. *Asheville*, 119 N. C., 606, and *Frisby* v. *Marshall*, 119 N. C., 570, to sustain her contention that it was not necessary to make the demand required by Section 757 before commencing her action.

The case of *Shields* v. *Durham* certainly sustains the contention of the defendant as to the time and manner of making this objection to the plaintiff's action. But we do not say that it applies to the matter of notice in this case. It is not necessary that we should do so, as our opinion rests upon a different reason.

The plaintiff alleges that judgment has heretofore been recovered against the defendant, and the defendant being a municipal corporation the judgment of the court could not be enforced by the ordinary execution. These facts being admitted by the demurrer entitles the plaintiff to the writ of mandamus, which writs in such cases are executionary in their nature and purpose. *High Ex. Legal Rem.* (3rd Ed.) Sec. 365, 365a.

It must be presumed that the notice required by Section 757 of *The Code* was given or waived when the action was brought, upon which judgment was recovered against the defendant. And there is no greater reason for notice to be given before demanding this executionary process to enforce the judgment, than there would have been for giving notice that the plaintiff was about to have execution issued. The demurrer should have been overruled.

There is error.

CLERK'S OFFICE v. COMMISSIONERS OF CARTERET COUNTY.

Costs—Appeal in Criminal Cases—Liability of County for Costs.

1. Costs, in this State are entirely creatures of legislation and do not exist without it.
2. There being no statute authorizing it, the officers of this Court are not entitled to collect from a county the costs accruing in this Court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal *in forma pauperis* and is insolvent.

This was a rule on the Commissioners of CARTERET County to show cause why they should not pay the fees claimed by the Attorney General and Clerk of the Supreme Court in *State* v. *Turner* and *Noe* and *Hassell.* Indictments against those defendants were found in Carteret County, but tried in Jones County, where they were convicted, and on appeal the judgments were affirmed. 119 N. C., 841. They gave no undertaking on appeal, nor certificate of inability to do so, and upon execution the Sheriff returned "No property," etc. The question was submitted to this Court as to the liability of the County.

Mr. C. L. Abernathy for Commissioners.

FURCHES, J.: This is a rule upon the Commissioners of Carteret to show cause why the County should not pay the costs due the officers of this Court in three criminal cases where the defendants had been allowed to appeal to this Court without giving bond, or without any order of the Court allowing them to appeal as paupers, and they are insolvent. The rule was granted under the ruling in *Clerk's Office* v. *Commissioners of Richmond*, 79 N. C. 598, and the conclusion arrived at in that case seems to justify the rule in this case. It is distinctly held in *Clerk's Office* v. *Commissioners of Richmond*, 79 N. C., 598, that Section 739 of *The Code* giving half fees in certain cases, did not apply to fees due this office. And the Court concluded from this fact that the officers of this Court were entitled to full fees against the County. But this conclusion seems to be a *non sequitur.* The conclusion would have been justified if the officers of this Court had been entitled to these fees, as against the County, before the enactment of the law contained in section 739. But this does not seem to have been the case, and we find no legislation to justify the conclusion arrived at in *Clerk's Office* v. *Commissioners of Richmond*, *supra.* It has been frequently held by this Court that costs, in this State, are entirely creatures of legislation, and without this they do not exist. *Guilford* v. *Commissioners*, 120 N. C., 23, 27 S. E., 94; *State* v. *Massey*, 104 N. C., 877, 10 S. E. 608; *Merrimon* v. *Commissioners*, 106 N. C., 369, 11 S. E., 267; *State* v. *Shuffler*, 119 N. C., 867, 26 S. E., 94. This being so, and there being no statute authorizing the officers of this Court to collect these costs out of the respondents, the rule must be discharged.

Rule discharged.

P. C. CREEKMORE et al. v. W. M. BAXTER et al.

Action to Recover Land—Mortgage by Lunatic—Dealings with Lunatic or Person non compos mentis—Fraud in Law—Trial—Issues.

1. Idiots, lunatics and persons otherwise *non compos mentis*, being incompetent to enter into any valid contract, every person who deals with them, knowing their incapacity, is deemed to perpetrate fraud upon them and their rights, and equity will set aside such contracts upon the ground of such fraud, charging the lunatic with only such benefits as he actually received from the transaction.
2. Where, in the trial of an action to recover land which had been sold under a mortgage executed by a person alleged to be *non compos mentis*, the jury found that the mortgagor was a lunatic at the time of the transaction and that the mortgagee had knowledge of the incapacity of the grantor, an additional finding, in response to an issue submitted at the request of the defendant, that no actual fraud was practiced by the mortgagee upon the mortgagor was not inconsistent with the other findings, no actual fraud having been charged in the pleadings.

CIVIL ACTION for the recovery of land, tried before *Bryan, J.*, and a jury, at Spring Term, 1897, of CAMDEN Superior Court. There was judgment for the plaintiffs on the verdict set out in the opinion of the Court, and defendants appealed.

Mr. G. W. Ward, for appellant.

Mr. E. F. Aydlett, for appellee.

DOUGLAS, J.: This is an action brought by the plaintiffs to recover land belonging to their ancestor, John O. Kelly, and sold under a mortgage alleged to have been executed by him, if at all, while insane, his insanity being then known to the mortgagee. By successive sales the land came into the possession of the mortgagee, O. F. Baxter, and upon his death descended to the present defendants. The following issues were submitted to the jury and answered:

1. Was John O. Kelly competent to make a deed at the

time he executed the mortgages mentioned in the answer? Ans. No.

2. Did Baxter have knowledge of the mental incapacity of Kelly at the time of the execution of said mortgages? Ans. Yes.

3. Was any fraud or undue influence practiced upon Kelly by Baxter in the execution of the mortgages mentioned in the pleadings? Ans. No.

4. Are the plaintiffs the owners of the land described in the complaint? Ans. Yes.

5. Are the defendants in the wrongful possession of the same? Ans. Yes.

6. What is the annual rental value of the same and damages? Ans. Annual rental value $40.; damages $150.

7. Was Kelly benefitted by the transaction with Baxter? Ans. Yes.

8. To what amount? Ans. $15.

The defendants tendered the third issue which was excepted to by the plaintiffs. The answer to said issue was, at the request of the defendants, directed by the Court. It is now contended that the answer to this issue, so directed by the court, contradicts the first and second issues answered by the jury of their own volition, and that therefore the verdict as a whole is insensible. The court below did not think so, nor do we. The first two issues found facts which constitute fraud in law. No other kind of fraud was charged in the pleadings; and the third issue, referring to actual fraud in fact, is neither necessary nor contradictory. It cannot be doubted that any one dealing with an insane person, knowing his insanity, deals with him at his own peril.

The law is well settled in this State that the deed of an insane person is voidable but not absolutely void. *Riggan* v. *Green*, 80 N. C., 236, citing 2 *Blackstone* 295 and 2 *Kent Com.* 451, and cited and approved in *Britain* v. *Mull*, 99 N.

C., 483, *Ellington* v. *Ellington*, 103 N. C., 54, *Odom* v. *Riddick*, 104 N. C., 515. This doctrine is generally held by modern authorities. *1 Am. & Eng. Enc. of Law* p. 146, note and cases cited. The rule as laid down in *Carr* v. *Holliday*, 21 N. C., 344, is as follows: "The lunatic has no legal capacity to contract, yet a court of equity will not interfere where the lunatic has actually had the *benefit* of the property of the defendant, *if the contract was made in good faith without knowledge of the lunacy* or incapacity, and where no advantage has been taken of the situation of the party."

This court in *Riggan* v. *Green*, *supra*, says: "Courts of Equity ever watch with a jealous care every contract made with persons *non compos mentis* and always interfere to set aside their contracts, however solemn, in all cases of fraud, or where the contract or act is not seen to be just in itself, or for the benefit of such persons; but where a purchase is made *in good faith without knowledge of the incapacity* and no advantage is taken, for a full consideration, and that consideration goes manifestly to the *benefit* of the lunatic, courts of equity will not interfere therewith"—citing *1 Story Equity* Sec. 227 and 227, 1 Chitty contract, 191, *Malton* v. *Camroux* 2 Exc. 487.

"The ground upon which courts of equity now interfere to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise *non compos mentis*, is fraud. Such persons being incapable in point of capacity to enter into any valid contract or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights." *Story Eq. Jur.* Sec. 227; *Adams Eq.* 183; *Odom* v. *Riddick, supra.* Courts of equity always protect innocent purchasers as far as possible and ordinarily place the parties back in *statu quo* when it can be done without injury to either; but if any one contracts with a lunatic, knowing his insanity, he must bear alone whatever loss arises from the transaction. The lunatic in such cases can be charged only with such benefits as he actually received.

In this case the jury found that Kelly was, at the time of their execution, incompetent to make the mortgages in question, that the mortgagee, Baxter, then knew that fact; and that Kelly was benefitted by the said transaction to the amount of $15. This amount was allowed by the court to the defendants as an offset, and we see nothing of which they can complain. Their exceptions to the computation of rents and measure of damages in the judgment cannot be sustained, as the facts upon which they rely do not appear in the record, and are denied by the opposing counsel.

The judgment is affirmed.

B. F. MARTIN et al. v. BUFFALOE et al.

Trial—Evidence—Witness—Transactions between Near Relatives—Deed, Alteration of, After Signing, With Consent of Parties—Burden of Proof.

1. While transactions between near relatives, no one else being present, are suspicious and the testimony of one of the parties thereto should be carefully scrutinized, yet, if the testimony be of such a nature as to convince the jury of its truth, it is entitled to as much weight as that of any other witness.
2. An alteration in or addition to a deed, such as filling up blanks therein, made by consent of the parties thereto, does not invalidate the instrument.
3. In such case the burden of showing the grantor's consent is upon the grantee.

CIVIL ACTION by the plaintiffs, as trustees of C. F. Futrell, against the defendant as Sheriff, and others, for damages for the wrongful seizure of a stock of goods, tried before *Graham*, *J.* at Spring Term, 1896, of NORTHAMPTON Superior Court. From a judgment against the defendants for $1,109 damages, they appealed.

Messrs. MacRae & Day, for plaintiff.
Mr. R. B. Peeble, for defendants (appellants).

FAIRCLOTH, C. J.: We will reserve the first exception at present. The other exceptions to the evidence are untenable.

His Honor charged the jury that "transactions between mere relatives, no one else being present, are always viewed with suspicion, and their evidence must be received with many grains of allowance, but if it is of such a nature as to carry conviction to your minds that said witnesses are telling the truth, then it is entitled to as much weight as that of any other witness." This charge is not only according to the precedents and authorities but is founded in reason, and the defendants' exception must be overruled.

An argument was made that the deed was incompetent evidence because it was probated before the trustee who was a Justice of the Peace. The record fails to show such to be the fact.

The first and main exception was to the introduction of the deed of C. F. Futrell to Martin & Flythe as trustees for the makers, creditors. The deed was signed and sealed and given to Martin with instructions to take it to the town of Jackson, employ an attorney, agree on his charges, insert the same in the deed and have it recorded, which was done, the insertion being "S. J. Calvert, attorney of Jackson, N. C. for professional services $50." The objection was that it was not C. E. Futrell's deed because of said addition after he had signed and sealed it, and made in his absence.

When a deed has been signed and delivered, and a stranger without consent of the grantor and grantee makes additions, interlineations or erasures and the like, quite a number of questions are presented and some of them were argued before us. These questions do not arise, because the inserted words were filled in with the consent of the grantor and grantee, and by direction of the grantor. So the blank in the deed was filled by consent of the parties and does not affect or invalidate the deed in other respects. The burden of showing the grantor's consent is upon the grantee. *Havens* v. *Osborne*, 36 N. J. Eq., 426. "If the alteration is made by consent of parties, such as by filling up the blanks or the like, it is valid." *1 Greenleaf Ev.* (14th. Ed.) Sec. 568a; *19 Johns* 396; *Collins* v. *Collins*, 24 Am. Rep. 639; 2 Am. & Eng. Enc. (2nd. Ed.) 205.

The principle is subject to the distinction between matters inserted which are material and those which are not essential to the operation of the instrument, for if it be deficient in some material part when executed, so as to be incapable of operation at all, it could not afterwards become a deed by being completed and delivered by a stranger in the absence of the party who executed it, and unauthorized by an instrument under seal. *McKee* v. *Hicks*, 13 N. C., 379. But when an alteration or addition is made by consent, it gives full effect to the intention of the parties without the violation of any rule of law. *Hudson* v. *Revett*, 5 Bing. 368.

In the present case, at the time the deed was signed and sealed, the blank left and subsequently filled in by consent was not essential to the operation of the deed as it then stood. The principle of this decision is recognized by this court in *Humphreys* v. *Finch*, 97 N. C., 303 and *Cheek* v. *Nall*, 112 N. C., 370. The deed was competent evidence and the judgment is affirmed.

UPPER APPOMATTOX COMPANY v. W. H. BUFFALOE et al.

Action on Constable's Bond for Escape—Void Process—Execution—Town Constable—Practice—Error Apparent on Record.

1. This Court is bound to correct errors that appear on the face of the record on appeal whether they were excepted to below or not.
2. A town or city constable cannot execute process outside of his town or city unless such process is directed to him in the name of the office he holds,—that is, as constable of his town or city.
3. A constable is not liable on his official bond for the release of a prisoner arrested by him on void process.

CIVIL ACTION on the official bond of defendant as constable of the town of JACKSON for damages for the release of a defendant in his custody under an execution against the prisoner, tried before *Bryan, J.*, at October Term, 1896, of NORTHAMPTON Superior Court, on a case agreed, the essential facts of which appear in the opinion of the Court. There was judgment for the defendant and plaintiff appealed.

Mr. R. B. Peebles, for plaintiff (appellant).
Messrs. MacRae & Day, for defendants.

MONTGOMERY, J.: The plaintiff's counsel contended that the court could not consider the objection argued here, because it was not taken below; that the officer who executed the final process in his hands by arresting the defendant in the execution was constable of the town of Jackson, and that he made the arrest in Garysburg, twelve miles from Jackson, the process not having been directed to him as constable of the town of Jackson. The contention is not sustained.

Errors that do not appear in the record proper must be excepted to in the court below in the proper manner and at the proper time, if it is desired that they shall be reviewed here; but this court is bound to take notice of and to correct errors that appear on the face of the record. *Thornton* v. *Brady*, 100 N. C., 38. The matter is before the court on a case agreed and the whole of that paper is an essential part of the record, as much so as the judgment which is pronounced upon it. In the case agreed it appears that the execution under which the defendant was proceeding was directed "To any constable or other lawful officer—greeting;" and not to the constable of the town of Jackson; that he arrested the defendant in the execution, in Garysburg, twelve miles from Jackson. In *Davis* v. *Sanderlin*, 119 N. C., 84, the court decided that "to authorize a town or city constable to execute process outside of his town or city, the process must be directed to him in that capacity. It is not necessary that the process should be directed to him in his individual name as town or city constable, but it must be directed to him in the name of the office he holds, that is, as constable of a certain city or town." In the case before us the defendant was not authorized to execute the process, the execution, under which he was acting and is therefore not liable to the plaintiff or to any one else for releasing the defendant.

Affirmed.

R B. PEEBLES v. WILLIAM TAYLOR, et. al.

Action to Recover Land—Sale of Land for Taxes—Authority of Sheriff to Enforce Lien for Taxes—Tax List—Sheriff's Deed for Taxes—Listing and Assessment of Property for Taxation —Presumption.

1. The only authority given to a Sheriff or Tax-Collector to enforce the lien on land for taxes is the tax-list with the order of the Clerk to the Sheriff to collect, endorsed thereon. The tax-collector can sell

or distrain for taxes due only in cases where the property actually appears on the tax-lists and has been duly assessed.

2. Where real estate was not listed for taxation, an order given the tax-collector by the County Commissioners to list it and collect the same amounts as in former years invested him with no authority under the Act to proceed to a sale; nor was he empowered to collect by sale or compulsion by an order of the Board of Commissioners allowing a party without title to list the land.

3. Evidence that land sold for taxes had never been listed or assessed rebuts the presumption raised by Section 72 of the Act of 1889 that a Sheriff's deed shows a proper listing and assessment.

CIVIL ACTION for the recovery of land tried on the usual issues in ejectment before *Bryan, J.*, and a Jury at August Term, 1897, of NORTHAMPTON Superior Court. The plaintiff claimed title to the land described by virtue of a sale for taxes by J. H. Whitehead, tax collector for Seaboard township, in May, 1891, for taxes alleged to be due thereon for the year 1890, by Etheridge & Brooks, and introduced the tax-collector's deed dated October 5, 1892, which was admitted under objection.

The defendants offered deed from Etheridge & Brooks to J. T. Griffin and others, trustees, dated October 25, 1889; then a deed from J. T. Griffin and others, trustees, to R. C. Marshall, trustee, for himself and others, dated September 6, 1890, and filed for registration, and registered on the 13th of April, 1894, thirty-one days after this action was commenced. It was admitted that both of said deeds covered the *locus in quo*. The defendants then introduced J. N. Whitehead as a witness (who it was admitted was elected tax-collector for Seaboard township in said county of Northampton in September, 1890, for the collection of the taxes for 1890; that his successor was elected in September, 1891, Whitehead retaining the tax-list for 1890, and the list for 1891 being given to his successor), and he testified that he sold the *locus in quo* in May, 1891, to R. B. Peebles, by virtue of the old tax-list of 1890; that he reported the land as unlisted to the Board of County Commissioners for said county in December, 1890, or January, 1891; that he wrote to Etheridge & Brooks several times for the taxes, but got no reply; that tax-collector for 1891 was appointed in September 1891; that the land was not on the tax-list for 1890 given to him by the Clerk of the Board of County Commissioners; that the said clerk gave him a copy of the original list; that there was no written order endorsed thereon by said clerk to collect the within taxes, etc.; that he did not list the land; that it was not listed by any one that he knew of; that the Board of County Commissioners instructed him to make a tax receipt against the land, or list it (he did not know which), and collect the tax; that upon reflection he thought they told him to list it; that he put it on his receipt book in words and figures as follows:

"May 4, 1891.	Etheridge & Brooks, State Tax .	$ 8 10
	"County Tax .	5 23
	"Total	$13 33"

The dates on my receipt book refer to the sale or payment; that the Board of County Commissioners told him to collect same amounts of tax that he had collected for preceding years; that the land in question is the only land Etheridge & Brooks ever owned in Seaboard township.

The record of the Board of Commissioners for said county was shown the witness, and his attention was called to an entry made in said record at the January meeting, 1891, in these words and figures to-wit: "It is ordered by the Board that Mrs. Fannie A. Boone be allowed to list 195 acres of land, valued at $1,000; also that Etheridge & Brooks be allowed to list 350 acres of land, valued at $2,000; all in Seaboard township," and he said that the 350-acre tract mentioned in said order was the same land that is in controversy.

Witness said:

"I advertised the land for sale by instructions of the Board of Commissioners.

"I wrote to Etheridge & Brooks two or three times before, and once after advertising, and got no answer.

"The land was listed in the name of Etheridge & Brooks for the year 1888 as the 'Garris land', 350 acres, valued at $2,000. In 1889 it was on the delinquent list, in the name of Etheridge & Brooks, and some one, I think it was J. A. Pruden, went before the Board of Commissioners and got the land relieved of a double tax, and I collected a single tax."

The only order for the collection of this tax was the verbal order given to J. H. Whitehead, as testified to by him, and the order of the records of the Board of Commissioners, made at their January meeting, 1891.

Witness further testified that neither name of Etheridge & Brooks, or Marshall, was on the tax-list when delivered to to him, or was ever actually put on it by any one.

The defendant R. C. Marshall was introduced as a witness, and was asked to state what interest he had in this land individually and as trustee. Plaintiff objected; objection was sustained, and defendants excepted.

The said Marshall then testified that he paid the taxes assessed for the years 1891, 1892, 1893, 1894, 1895 and 1896, and that he had been in possession of said land since 1890.

During the trial said Marshall in open court paid to the County Treasurer the amount of taxes for which the land was sold—$13.53.

The defendant asked the Court to instruct the jury to answer issues first and second "No." This the Court refused to do, and the defendant excepted. Thereupon the Court instructed the jury, if they believed the evidence, to answer the first and second issues "Yes." Defendants excepted.

There was a verdict for plaintiff, and from the judgment thereon the defendants appealed.

Mr. R. O. Burton, for plaintiff.

Messrs. MacRae & Day, for defendants (appellants).

MONTGOMERY, J. This is an action for the possession of a tract of land, the plaintiff claiming title under a certain deed executed to him on the 4th of May, 1891, by the tax-collector of Seaboard township. The sale under which the deed was made was for taxes alleged to have been assessed and due upon the land for the year 1890.

When the first appeal was heard by this court at its February term, 1896, the only question presented for our decision was, whether a sheriff's or a tax-collector's deed made under sale of land for taxes where the land was listed in the name of a person not its owner, was *prima facie* evidence of title. As the case was then constituted it appeared that the property had been actually listed on the tax list in the names of Etheridge & Brooks, persons not the owners. On the first trial His Honor held that the tax collector's deed passed no title to the purchaser and the jury were instructed to answer the issue as to whether the plaintiff was the owner of the land and entitled to possession "No". This was held to be error, and the case was sent back for a new trial.

After the decision of the court the answer was amended: and it was then averred by the defendants that the tract of land described in the complaint had never been listed for taxation in 1890, and that at the time the sale was made the tax list did not contain the land nor show that it had been listed either by these defendants or any other person. On the last trial it appeared from the testimony of the officer who made the sale, that the copy of the tax list for 1890 given to him by the clerk of the Board of County Commissioners—and under which he proceeded to make the sale—did not contain the tract of land, and that it was not listed for taxation on the tax list by any person in that year. It was admitted in the argument here by plaintiff's counsel that the tract of land was not actually listed for taxation on the lists of 1890; but it was insisted that the officer, nevertheless, was empowered to sell the land by virtue of an instruction given him by the commissioners to list it and to collect same amounts which he had collected in preceding years; and also by virtue of an order made by the County Commissioners, at their January meeting 1891, which is in the following words: "It is ordered by the Board that Mrs. . . . . be allowed to list 195 acres of land valued at $1,000; also that Etheridge & Brooks be allowed to list 350 acres of land valued at $2,000." It was also argued here that the tax-collector was authorized and empowered to make the sale of the land, even though it had not been listed, under the provisions of Section 33 of the Act which declares "That the taxes assessed on real property shall be a lien thereon from and including the 1st day of June in the year in which they are levied until the same are paid."

The last position is clearly untenable. The lien created by Section 33 of the Act must be enforced according to law; and no where is the tax-collector authorized to enforce the lien of his own motion. The authority of the sheriff or tax-collector to collect the taxes is given to him in a precise and particular manner in Section 32 of the Act in the following words: "The Clerk shall endorse on the copies (of the tax lists) given to the sheriff an order to collect the taxes therein mentioned, and such order shall have the force and effect of a judgment and execution against the property of the person charged in such list." It is then the tax list with the Order of the Clerk to the sheriff to collect endorsed thereon which is the sheriff's authority to collect by distraint or otherwise. *State* v. *McIntosh*, 31 N. C., 307; *State* v. *Woodside*, 30 N. C., 104. If it should be conceded (which we do not) that since the decisions in the last named cases the law has been changed so as to raise a presumption that the clerk had done his duty and had endorsed on the tax list the order for collection when he delivered the list to the sheriff, yet still the lists themselves, must be in the hands of the sheriff, before he can collect the taxes by compulsion or sale.

His Honor, when he instructed the jury to find the issues "Yes", if they believed the testimony, must have had reference to the testimony of the tax-collector himself in reference to the verbal instructions which he had received from the commissioners, and to the order of the commissioners at their January meeting 1891 in which Etheridge and Brooks were allowed to list the land. His Honor must have considered these facts, if believed by the jury, to constitute in law, a listing and assessment of the property. In this there was error. It is true that under Section 72 of the Act, deeds made by the sheriff in cases of the sale of land for taxes are presumptive evidence, in suits in relation to the purchases at such sales, that the property had been listed and assessed; but we do not wish to make any ruling by inference of law in the construction of this statute. We take these words "listed and assessed" in their natural sense and meaning: that is, that they require the property sold to actually appear on the tax list, and that the taxes shall be assessed upon such listing by the competent legal authorities. The tax collector can sell or distrain for taxes due only in cases where the property actually appears on the tax list and has been duly assessed.

In this very case it is almost certain that there was a mistake about the entry permitting Etheridge & Brooks to list the property; for they did not list it, and it appears from the proof that they had conveyed the same by deed of October 25th, 1889, to Griffin, Olds & Jenkins. But this is an immaterial point, and is only meant to point out the danger in the way if the court should receive such entries and such testimony as any evidence whatever of the actual listing and assessment of the property. His Honor should have instructed the iury that if they believed the testimony they should find the issues, "1. Is plaintiff the owner of the land described in the complaint?" No; and "2. Do defendants unlawfully detain said land from plaintiff?" No, for if the evidence was true the property had not been listed and assessed, and that the presumption in favor of the deed had been rebutted. The defendants had already introduced competent testimony going to show that, at the time of the sale, the title to the property was either in themselves or in Griffin, Olds & Jenkins under whom they claim by deed made September 6th, 1890, and registered on the 1st day of April, 1894, a few days after the commencement of this suit; that all the taxes accruing since the sale had been paid by the defendants and that those for the year 1890 (which the defendants paid during the trial to the County Treasurer) the defendants had theretofore, in 1891, offered to pay to the plaintiff with all costs and the interest required by law in such cases, which the plaintiff refused to receive.

Error.

J. W. STEWART v. MACON BRYAN.

Practice—Judgment by Default Final—Charge of Fraud—Imprisonment for Debt.

1. A court has no right to enter a final judgment by default on the charge of fraud and embezzlement for collecting and appropriating money received on collaterals, where the defendant makes no appearance or defence, but only a judgment by default and enquiry, if requested by the plaintiff.
2. Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, and judgment by default was entered, the presumption is that the judgment was rendered on the note, as was right, and not on the charge of fraud, which the Court had no right to do.
3. In such case, the judgment is final on the note and the cause is not retained on the docket for further action.
4. Imprisonment for debt being prohibited by the Constitution, a defendant cannot be arrested upon a judgment on a note.
5. When the complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraud in the embezzlement of the proceeds of collaterals deposited as security for the note, and, in default of appearance and defense, judgment was rendered on the note but not on the charge of fraud, the plaintiff was not entitled to an order of arrest under Sections 291 and 447 of *The Code*, as amended by Ch. 541, Acts of 1891, since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest.

Petition for *habeas corpus* heard before *Bryan, J.*, at Chambers in Newbern, on June 8th, 1897. The writ was denied and defendant appealed.

Messrs. Clark & Guion, for plaintiff.
Mr. W. D. McIver, for defendant (appellant).

FURCHES, J.: Plaintiff instituted an action against the defendant, returnable to May Term, 1896, of CRAVEN Superior Court. In the first paragraph of his complaint he alleges that on the 6th of March, 1891, the defendante excuted his note to plaintiff for $905.60 to be due on the first day of November of that year.

In the second paragraph of his complaint he alleges that defendant assigned and delivered to plaintiff certain notes and mortgages as collateral security to secure said note.

In his third paragraph he alleges that there still remains due and unpaid on said note the sum of $283.90.

In his fourth paragraph the plaintiff alleges that defendant has collected the collaterals, which he agreed to collect and pay over to the plaintiff, and now refuses to pay the money so collected on said collaterals to the plaintiff, but has appropriated the same to his own use and benefit.

In his fifth paragraph he alleges that the money so collected by the defendant amounts to the sum of $283.90. This complaint was verified. Wherefore plaintiff prays that he may recover damages for the wrongful conversion of this fund by the defendant. A summons was duly served on the defendant returnable to May Term. But he failed to appear, and made no defence to the plaintiff's action, and judgment was taken by default.

This complaint states two causes of action—one upon the note and the other for the embezzlement in using and appropriating to his own use the trust funds, the money he had collected on the collaterals placed in his hands for collection by the plaintiff.

This judgment seems to be a final judgment "for the sum of $283.90 and costs of this action to be taxed by the clerk, which sum to bear interest from the 6th day of March, 1891, at the rate of eight per cent. until paid."

The court had the right to enter a final judgment on the note—the cause of action stated in the first and third paragraphs of the complaint. *Code*, section 385. But the court had no right to enter a final judgment on the charge of fraud and embezzlement for collecting and appropriating the money received on the collaterals, charged in second, fourth and fifth paragraphs of the complaint. And the presumption is that he entered judgment upon the cause of action—the note—as he had the right to do, and not on the charge of fraud which he had no right to do. *Code*, section 386. But the judgment shows it was entered on the allegations in the first and third counts—the note, as it is to draw interest at the rate of eight per cent. from the 6th day of March, 1891, until paid, this being the date of the note. It is a final judgment as it is for the debt, also for costs of action (*Freeman on Judgments*, 16), and it is not retained on the docket for any further action.

It seems that the Judge after pronouncing judgment, but on the same paper and over the same signature, proceeds to find (as he says) from the complaint the matters alleged in the second, fourth and fifth paragraph of the complaint. But he pronounces no judgment on these findings. He had no right to find these facts nor to pronounce any judgment upon his findings. He had the right to give the plaintiff a judgment by default and inquiry, if this had been asked for. But this was not asked for and no such judgment was taken.

It was contended on the argument that if the judge had no right to find the facts as to fraud, nor to pronounce a final judgment, still, if he did so, and the defendant did not appeal, it would be an irregular and not a void judgment. And not being a void judgment, the defendant could not attack it in this collateral way. This proposition as to collateral attack is correct, if it is an irregular and not a void judgment, as it should then be by motion in the cause. *Parker* v. *Bledsoe*, 87 N. C., 221; *Code*, Sections 295, 342, 345. In this case, we see that the judgment is regular as to the indebtedness on the note, and that there is no judgment whatever upon the other cause of action stated in the complaint.

It is too plain to argue that the defendant cannot be arrested upon the judgment on the note. Constitution, Art. I, Sec. 16; *Code*, Sec. 290, and 291. It is equally plain that he cannot be arrested, in *this action* on the cause of action stated on the charge of fraud, for the reason that there is no judgment. But under *Peebles* v. *Foote*, 83 N. C., 102, and Chapter 541 of the Acts of 1891, amending Section 447 of *The Code*, we would hold that the defendant might be arrested upon this judgment by default final on the note and the allegations of fraud in the complaint, if these allegations did not themselves constitute an independent cause of action. In *Peebles* v. *Foote*, there was but one cause of action—the debt. The fact that Foote was concealing his property, or was about to leave the State, was no cause of action by Peebles against him, but only affecting Peebles' means of enforcing his judgment. In this case, the fact that the defendant embezzled the property of the plaintiff does not lessen his ability to pay nor the plaintiff's means of enforcing his judgment. But if the plaintiff should recover against the defendant upon the charge of fraudulent appropriation of plaintiff's property, that would be an independent judgment, and the satisfaction of this judgment would not be a discharge of the other. This seems to distinguish this case from *Peebles* v. *Foote*, construing section 447, as amended.

This case is very different from *Preiss* v. *Cohen*, 117 N. C., 54. In that case, issues were joined by the denials in the defendant's answer. In this case, there was no answer —no denial—and therefore no joinder of issues, and the plaintiff allowed that cause of action, founded on fraud, to abate, and while the plaintiff cannot have the defendant arrested on this judgment, for the reasons given, nor upon the complaint filed in this action, because the action for the fraud has abated, or in some way gone off the docket and is not now pending, so as to have a warrant of arrest before judgment, yet, whether the plaintiff cannot commence another action upon the fraud and have the defendant arrested, is not a question before us now.

As there was no judgment on the allegations of fraud, and no action pending in which the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest to issue, our opinion is that the defendant was illegally arrested.

It will not do to carry the doctrine of *Peebles* v. *Foote*, under Section 447 of *The Code*, as amended by the Act of 1891, to the extent contended for in the argument for plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution.

The plaintiff has stated two causes of action—one on a note and the other for embezzlement. We will suppose a trial had taken place and plaintiff recovered on the note, but failed on the count for embezzlement. Could it be contended that he would be entitled to an execution against the body of the defendant, and to imprison him? If the contention of the plaintiff is true, why not, as fraud is alleged in the complaint?

As we find no legal authority for the arrest of defendant, he is entitled to relief by *habeas corpus* proceeding. *Claflin* v. *Underwood*, 75 N. C., 485. The defendant is entitled to his discharge.

Error.

LOVITT HINES et al. v. F. P. OUTLAW and wife.

Action to Foreclose Mortgage—Mortgagor and Mortgagee, Dealings Between—Presumption of Fraud—Burden of Proof.

1. When a transaction between parties occupying a fiduciary relation, such as mortgagor and mortgagee, is impeached, there is a presumption of fraud, and the burden of proving the dealings to have been fair, *bona fide*, and without undue influence arising out of such relation, rests upon the party occupying the position of advantage.
2. Where a lessor of land mortgaged it to the lessee who surrendered it upon the determination of the lease, without having cultivated and improved it, as required by the lease, and the lessor made no claim for damages at the time, but, in an action for the foreclosure of the mortgage, set up such damages as a counter-claim; *Held*, that a presumption of undue influence arose from the relation of mortgagor and mortgagee, which put upon the mortgagee the burden of proving that the land was accepted at the end of the lease as a compliance with its terms and that no undue influence, arising out of the fiduciary relation, was used to induce such acceptance.

ACTION for the foreclosure of a mortgage tried before *Timberlake, J.*, and a jury, at Spring Term, 1897, of CRAVEN Superior Court. There was a verdict for the plaintiff and from the judgment thereon the defendants appealed, assigning as error the refusal of an instruction specially prayed for, which is set out in the opinion of the Court.

Messrs. Clark & Guion, for plaintiffs.
Messrs. Simmons & Ward, for defendants (appellants.)

FAIRCLOTH, C. J.: On April 25, 1889, the defendants leased 100 acres of land to plaintiff for five years from January 1, 1890, with stipulations that plaintiff should ditch, fence and otherwise improve said land. On May 6, 1889, the defendants borrowed money from plaintiff and secured the same by note and mortgage on certain lands including said 100 acres, due and payable January 1, 1895, and on October 14, 1895, the plaintiff instituted this action for judgment and foreclosure of the mortgage, alleging nonpayment, &c.

The defendants answer and acknowledge the execution of the lease and mortgage, and say that plaintiff would not take the mortgage unless the lease was first made, and aver that the two transactions were one agreement in substance. They also set up a counter-claim in their answer for damages by reason of the plaintiff's failure to perform the express stipulations in the lease. The plaintiff answers this counter-claim and avers that, if the stipulations were not literally performed when the defendants resumed possession of the leased land on or about January 1, 1895, they expressed themselves satisfied with the then condition of the leased land and waived all claim for damages in that respect. The defendants denied such acquiescence and waiver, and in their supplemental answer say that any seeming acquiescence and acceptance were not a voluntary act, but was due to the fact that they as mortgagors were not free agents, but were under the power of the plaintiff as mortgagee. The issues were:

1. Did the plaintiff, Lovitt Hines, perform the conditions and stipulations named in the lease? Answer, No.

2. Did the defendants accept the land as described in the lease at the end of the term, admitting the conditions to be as required by the covenants contained in the lease? Answer, Yes.

Each party offered evidence in support of their respective contentions. At the close of the evidence the defendant asked the Court to charge the jury: "That if they should find that when the land was surrendered on January 1, 1895, it was not actually in the condition required by the lease, then under the facts, as testified to by plaintiff, Outlaw, and the admitted relations of the parties, they should find that defendant did not accept the land as a compliance with the contract, unless they shall be further satisfied by a preponderance of the evidence that the defendant in such acceptance acted freely and voluntarily, without fear of oppression from the plaintiffs, and acted substantially as he would if he had not been the mortgagor of plaintiff," which was refused. These facts show clearly a case of "*fiduciary relations*" as pointed out in the following cases, in which it is also held that the plaintiff must take the *burden of proving* that the impeached transaction was *fair*, *bona-fide* and without undue influence arising out of the relations of the parties. *Whitehead* v. *Hellen*, 76 N. C., 99; *Lee* v. *Pearce*, 68 N. C., 76. *Bigelow on Fraud*, page 260, says that, "out of these relations, including mortgagor and mortgagee, a presumption of fraud arises, in dealings between the parties, because of the undue advantage which the situation itself gives to one over the other." It seems due to good faith that such a presumption should arise where confidence is reposed and the property interest of one is committed to another. Hence the reason of the rule that all such dealings should be explained by a preponderance of proof by the party occupying the position of advantage.

The above is the rule followed by this Court without exception, since the above cases were decided. The prayer of the defendant above quoted sought the benefit of the above propositions and should have been given in substance, and we do not find it in any part of the charge of His Honor.

Several other questions of some interest were argued in this court but as we must reverse the judgment, to the end that a new trial may be had, those questions may cease to be important and we will not now consider them.

During the argument here plaintiff's counsel consented that the judgment might be reformed so as to leave no personal judgment against E. G. Outlaw.

Error.

J. R. CARY CO. v. R. E. ALLEGOOD.

Practice — Jurisdiction — Coram Non Judice — Consent of Parties.

1. An objection to the jurisdiction can be made at any stage of a proceeding.
2. Consent of parties cannot give jurisdiction where it does not attach under the Constitution and laws.
3. A Justice of the Peace has no jurisdiction to direct the application, by a Sheriff, of the proceeds of an execution issued by another Justice of the Peace upon the ground that the latter was null and void.

CIVIL ACTION tried before *Timberlake, J.*, at February 1897 Term of CRAVEN Superior Court, on an agreed statement of facts, which were in substance as follows:

On the 11th of September, 1896, Powell, Gwatheny & Co., obtained judgment against the defendant Allegood before S. R. Street, J. P., and executions were issued thereon on the same day; on the 6th day of November, 1896, the justice endorsed each of the executions as follows: "Execution renewed this Nov. 6th, 1896." The plaintiffs, Jno. R. Cary Co. and Old Dominion Paper Co., recovered judgments before William Colligan, J. P., on the 23d day of December, 1896, on which executions were issued on the same day and, together with the executions issued by Street, J. P., were on that day placed in the hands of the Sheriff, who made returns thereof on the 7th day of January, 1897. On the 24th day of December, 1896, Colligan, J. P., at the instance of Jno. R. Cary Co. and Old Dominion Paper Co., issued a rule or order requiring the Sheriff to show cause why the moneys received by him under the execution in his hands should not be paid John R. Cary Co., and the Old Dominion Paper Co., in preference to and prior to any other execution in his hands in favor of any other creditors of Allegood.

Upon the hearing of said rule by Wm. Colligan, J. P., judgment was rendered, (the attorney for the said Powell Gwatheny & Co., being present as well as the said Sheriff of Craven county,) (in each of said notices in each of said actions) that John R. Cary Co., and the Old Dominion Paper Co., were entitled to the moneys arising under their execution in preference to Powell Gwatheny & Co., and the Sheriff was ordered to pay said moneys upon said executions. From said judgments and orders Powell Gwatheny & Co., appealed to the Superior Court.

The plaintiffs, Jno. R. Cary Co., and the Old Dominion Paper Co., contended that they had priorities over the executions issued in favor of Powell Gwatheny & Co., upon the grounds that the attempted renewal of executions in favor of Powell Gwatheny & Co., by the endorsement at the bottom of the executions was invalid and said executions were dormant and invalid when placed in the hands of the Sheriff.

His Honor held, that the judgments in favor of Powell Gwatheny & Co., should be first paid in full out of the proceeds of the execution. From such judgment Jno. R. Cary Co., and Old Dominion Paper Co., appealed.

Messrs. C. R. Thomas and *D. L. Ward*, for plaintiffs (appellants).

Mr. H. C. Whitehurst, for Powell Gwatheny & Co., appellees.

MONTGOMERY, J. The Sheriff of Craven County levied upon and sold the property of a debtor under final process issued and delivered to him, on the same day, by two different justices of the peace—the execution creditors being different persons. One of the Justices had a rule served on the Sheriff ordering him to show cause why he should not pay over the proceeds of the execution sales to the creditors named in the executions which had issued from his court. Upon the hearing, the Justice ordered the Sheriff to pay the entire proceeds in his hands to the creditors in the executions which he had issued, on the ground that the executions which the other justice of the peace had issued were void in form and substance, and of no effect. So far as we know, that proceeding of the justice has no precedent in the jurisprudence of our State. It was in no sense analagous to the practice grown into use in this State through the tolerance of the courts by which sheriffs are advised as to the manner of the application of funds derived from sales under executions, where there are conflicting claimants. There, the advice is given upon the understanding that the executions themselves are regular and valid, and the only question being that of priority of payment. But in the matter before us, the plain purpose of the proceeding was to have an execution issued by one justice of the peace declared null and void by another justice. The justice who made the order had no jurisdiction in the premises. The counsel of the appellants in their brief insist that this court shall determine the law question involved in the case, regardless of the matter of jurisdiction, and urge as a reason therefor that all the parties interested agreed that His Honor should decide the law upon the agreed state of facts, and that also for the first time the question of jurisdiction was argued in this court. The objection to the jurisdiction is always in time. Consent of parties cannot give jurisdiction in cases where it does not attach under the Constitution and laws. This court has sometimes made decisions in cases where the matter was of great public interest when the appeals were irregular or premature, but it will give no opinion in any case where it appears that there is an entire lack of jurisdiction, as appears in this case.

Proceeding dismissed.

M. F. PARKER, ADMINISTRATOR OF D. L SIMONS, v. GEORGE A. HARDEN, EXECUTOR OF NANCY M. SIMONS.

Pleading—Practice—Amendment—Statute of Limitations—Burden of Proof—Trust—Conversion—Date of Conversion of Trust Funds—Presumption.

1. Where, in an action for the alleged conversion of money, the complaint did not state that the funds were received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under Section 273 of *The Code*, conforming the complaint to the evidence.
2. When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited.
3. In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession.
4. A trust terminates upon the death of the beneficiary.
5. When the bar of the statute is complete before the death of the party against whom a cause of action existed, Section 164 of *The Code* has no application.

CIVIL ACTION tried before *Robinson, J.*, and a jury at February Term, 1897, of BERTIE Superior Court. There was a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Mr. R. B. Peebles, for plaintiff.
Mr. Francis D. Winston, for defendant (appellant).

CLARK, J. The jury found the issue as to the first cause of action against the plaintiff, *i. e.* they found that the defendant did not take into his possession money belonging to the plaintiff's intestate which had been found among the effects of the defendant's testator. There is no appeal by the plaintiff, and that cause of action is therefore not before us.

The second cause of action was for the alleged conversion of $1400.00 belonging to D. L. Simons (who was the plaintiff's intestate) which at his death, on July 27, 1882, it is alleged was taken possession of by the defendant's testator, Nancy Simons, who was the wife of D. L. Simons.

Both the three years and ten years statute of limitations (*Code*, Sections 155 and 164) were pleaded, and the jury found that the defendant's testator had converted the sum of $1172.50. From this verdict and the judgment thereon the defendant appealed. The defendant's testator died in 1896. There was no allegation in the complaint that the wife received said fund as a trustee or agent, though there was some evidence tending to that end. But to be considered the complaint should have been amended to conform to the evidence (*Code*, Sec. 273) for there must be always *allegata* as well as *probata*. Yet had this been done, the statute having been pleaded, the burden devolved upon the plaintiff to show that the cause of action accrued within the time limited. *Graham* v. *O'Bryan*, 120 N. C., 464; *Hussey* v. *Kirkman*, 95 N. C., 63; *Moore* v. *Garner*, 101 N. C., 374; *Hobbs* v. *Barefoot*, 104 N. C., 224; *Koonce* v. *Pelletier*, 115 N. C., 234.

It is therefore immaterial whether the three years or the ten years statute applied, for the plaintiff offered no evidence to show the date of the conversion, and in the absence of proof the presumption is that the conversion was of the date of taking the property into possession in July, 1882. Besides if trustee for the husband, the trust was terminated by his death, which would have put the statute in motion; and if trustee for his children, that fact is not alleged in the complaint, nor is the action brought by them.

The Code, Section 164, has no application, as the testator died after the bar of the statute was complete. In refusing the prayer to instruct the jury that the claim was barred by the statute of limitations there was error.

Error.

R. C. BAZEMORE v. W. E. MOUNTAIN and wife.

Practice—Non-Suit—Appeal—Married Woman—Contract for Support of Family—Separate Estate of Married Woman—Agency of Husband.

1 In the consideration of an appeal from a judgment of non-suit the evidence must be taken in its strongest light against the defendant and every thing it tends to prove must be taken as proved.

2. The contract of a married woman, made for the support of herself and family, is valid and her separate estate is liable therefor.

3. A husband may be the agent of his wife in the management of her separate estate and for his contracts, as such agent, made for the support of herself and family, her separate estate is liable.

4. Where, in the trial of an action to subject the separate estate of a married woman to the payment of a debt alleged to have been contracted for the support of her family, it appeared that the wife owned farm lands in her own name, that her husband contributed nothing to the support of the family; that her only means of support was the rental from her lands which she was unable to rent without furnishing supplies to the tenants; that she had no supplies and could not furnish them except by contracting with some one else to do so and that she contracted with the plaintiff to furnish such supplies; *Held*, that such contract was for the benefit of the wife and family and necessary for their support and her separate estate is liable therefor.

CIVIL ACTION tried before *Robinson, J.*, and a jury, at the Fall Term, 1896, of BERTIE Superior Court. After the evidence was in, His Honor intimated that plaintiff could not recover upon his evidence and he, thereupon, submitted to a non-suit and appealed.

Mr. Francis D. Winston, for plaintiff (appellant).
Mr. R. B. Peebles, for defendant.

FURCHES, J. This action is brought against the defendants W. E. Mountain and Patty W. Mountain, his wife, for supplies furnished one Spruill, a tenant of the *feme* defendant. The allegations of the plaintiff are that the defendant Patty is the owner in her own right of valuable real estate, consisting mainly of farming lands upon which she has mules and farming implements suitable for its cultivation. That her husband is of no account, has no income and does not contribute anything to the support of his wife and family. And they have no means of support except from the rents of the land of the *feme* defendant. That she was unable to rent her land without making advancements to the renter to enable him to cultivate the crops. This she could not do, as she had neither the supplies nor the money to buy them, and could only do so by procuring some one else to furnish them for her. That the defendant, W. E. Mountain, was the agent of the *feme* defendant, and as such agent he contracted with the plaintiff to furnish the supplies sued for in this action. And His Honor says, in making up the case on appeal, that there was evidence tending to prove all these facts.

At the close of the evidence, the court intimated an opinion that the plaintiff had not made a case and could not recover. Upon this intimation the plaintiff submitted to a judgment of non-suit and appealed.

As the evidence must be taken in its strongest light against the defendant, every thing it tends to prove must be taken as proved in the consideration of this appeal. *White* v. *R. R. Co.*, at this term.

It must therefore be taken as facts proved that the defendant, W. E. Mountain, was the agent of the *feme* defendant, Patty; that she was the owner in her own right of a valuable landed estate suitable for farming purposes, stocked with mules and furnished with farming implements; that her husband was of no account, had no income and contributed nothing to the support of his family, the *feme* defendant and their children; that the rents from these lands were the only means the *feme* defendant had of supporting herself and family; that she could not rent her lands without furnishing supplies to her tenant to aid in making the crops; that she did not have the supplies to furnish, nor the money with which to buy them; and the only means she had of furnishing supplies was by contracting with some one to do so for her, and that W. E. Mountain, as the agent of the *feme* defendant, contracted with the plaintiff to furnish the supplies, sued for, to one Spruill, the tenant of the *feme* defendant, and they were furnished under that contract.

Taking these facts to have been proved by the evidence, as we must do in this appeal, there is error.

The husband may be agent of his wife. *Witz* v. *Gray*, 116 N. C., 48. If the *feme* defendant could make this contract with the plaintiff, she could make it by her agent. If it was for the support of herself and family, she had the right to make the contract, and her separate personal estate is liable for its payment. *Code*, Section 1826; *Flaum* v. *Wallace*, 103 N. C., 296.

The only remaining question, and the one upon which we suppose His Honor based his ruling, is, Was this contract for the benefit of the *feme* defendant and her family? And, when we consider that the only means of support she had was the rents from her lands, that she was unable to rent them without furnishing supplies to her tenants, for which she as landlord would have a first lien for their payment as they were her supplies, though delivered to defendant's tenant by the plaintiff, and that she had no means of furnishing them, except by a contract with some one else to do so for her, we must hold that this contract was for the benefit of the *feme* defendant and her family, and that under Section 1826 of *The Code* she is bound by the contract, and that her separate personal estate is liable for the same.

There is error. The judgment of non-suit must be set aside and a new trial awarded.

Error.

W. P. BURRUS and wife v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

Action to Recover Insurance Premium Paid—Drafts—Notice—Trial—Weight of Evidence—Directing Verdict.

1. Where, on the trial of an action, a material fact is in dispute and the evidence thereon is conflicting, the trial judge cannot weigh the evidence and say how the fact was.
2. Where, on the trial of an action, a material fact was whether a draft had been presented to plaintiff for acceptance and payment and it appeared that plaintiff, having received notice that a draft had been drawn on him by the defendant, applied at the bank where he usually received drafts but the defendant's draft had not been received and plaintiff testified that he was employed at a cotton gin; that his duties were outside the office and that he had no desk there but that his place of business was at his residence and that the draft had never been presented to him; while the bank collector testified that he took the draft to the gin for acceptance three times, left a printed notice and notified plaintiff's son. *Held*, that whether the draft had been duly presented was a question for the jury.

CIVIL ACTION, tried before *Timberlake, J.*, and a jury at May Term, 1897, of CRAVEN Superior Court. Plaintiff sought to recover all the premiums, which he had paid to defendant on a policy of insurance, upon the ground that defendant had declined to accept the last premium and declared the policy forfeited. The defendant's contention was that the premium was not paid when due and that by the terms of the policy the insurer could only renew it after submitting to a medical examination which he refused to do. Plaintiff contended that the defendant had agreed to draw for the premiums as they fell due through a certain bank in Newbern; that he was ready to pay the draft for the maturing premium and enquired at bank for it on the right day and it was not there and that some days thereafter he sent a check to the defendant for the amount of the premium and defendant refused to receive it.

The defendant averred that the agreement was that draft should be drawn through a Richmond, Va., Bank which was done and that the draft had been presented for payment at plaintiff's place of business and returned unpaid. There was conflicting testimony as to the presentation of the draft. At the close of the evidence His Honor stated that he would direct the jury to find that the plaintiff was entitled to recover the sums paid by him as premiums with interest, there being no dispute as to their amount. The defendant excepted and appealed from the judgment rendered on the verdict so directed.

Messrs. Simmons & Ward, for plaintiff.

Messrs. Clark & Guion and *MacRae & Day*, for defendant (appellant).

FAIRCLOTH, C. J.: One of the material questions presented is whether the defendant's draft for premium on policy was duly presented. The plaintiff testified that he received a letter saying that the draft had been sent, that he applied at one of the Newbern banks, where he had usually received drafts, and the bank said it had not received the draft, and that it had not been presented to him. He further said "I had no desk at gin, my duties were outside the office." Matthews said he took the draft for acceptance to the gin three times, where the plaintiff was supposed to stay, and said to be his place of business, and left a printed notice on the desk in the office at the gin, and was told that the plaintiff was at the cotton exchange, by his son.

Lumsden testified that he was secretary of the cotton gin, that he employed the plaintiff to weigh cotton, &c., and he sold cotton on the cotton exchange, and had no desk in the witness' office.

Spruill testified that he told Matthews at the gin that the plaintiff was at the wharf.

Dewey testified that he was cashier of the Farmer's & Mechanic's Bank at Newbern; that he gave the draft to his collector who returned it unpaid, and he returned it to the Richmond bank. The bank determines where it is to be sent.

The president of defendant company testified that Dewey returned the draft, saying: "Presented three times. No attention paid to notice"; that it was presented at three different places, considered his headquarters; once to his son in person, and an additional printed notice left for him."

Plaintiff recalled said: "My private place of business was at my house. When I got through cotton sales at cotton exchange, I went back to the gin."

We have referred to so much of the evidence only to show that the presentation of the draft was in dispute and that there was conflicting evidence in that matter. The court stated that only one issue would be submitted: "What amount, if any, is the plaintiff entitled to recover"? and refused to submit any other. It is the province of the jury to find the fact involved in the issue or issues presented in the pleadings, and in all cases the credibility of witnesses is exclusively for the jury to consider. In criminal matters the jury must render the verdict and not the court even if the State's evidence is uncontradicted, because the plea of not guilty disputes its credibility, and the presumption of innocence can be overcome only by the verdict of a jury. *State*

v. *Riley*, 113 N. C., 648; *U. S.* v. *Taylor*, *3 McCrary*, 500 and 505. In civil actions the rule is different, and is so well stated by this court that we will simply copy the language of *Pearson, J.:* "When the plaintiff fails to make out his case, the Judge may say to the jury, "if all the evidence offered be true the plaintiff has not made out a case," and direct a verdict to be entered for the defendant unless the plaintiff chooses to submit to a non-suit. It is, in effect, a demurrer to the evidence. The plaintiff has no right to complain, for in reviewing the question of law he has the benefit of the supposition that the evidence offered by him and the inferences of fact are all true. So, when the plaintiff's case is admitted, the whole question turns upon the defence attempted to be set up. If, taking the facts to be as contended for by the defendant, the court is of opinion that he has made out no answer to the action, it is proper and saves time for the court to direct the verdict to be entered for the plaintiff. The defendant is not prejudiced because upon appeal the question will be presented in the most favorable point of view for him." *State* v. *Shule*, 32 N. C., 153. The present case does not fall within the above rule, as His Honor seems to have erroneously assumed.

Waiving all other controverted questions, the fact as to whether the draft was duly presented was in dispute, and the evidence thereon was conflicting. When such is the case, the court cannot weigh the evidence and say how the fact was. *White* v. *Railroad*, at this term, and cases cited.

Venire de Novo.

W. A BENTON v. RUFFIN COLLINS.

Interlocutory Order—Practice—Premature Appeal.

An appeal from an order of the Court below setting aside the verdict on one of several issues and awarding a new trial thereon is premature and will be dismissed. In such case, an exception should have been noted which could have been passed upon on the appeal from the final judgment.

CIVIL ACTION for damages, tried before *Timberlake, J.*, and a jury, at April Term, 1897, of FRANKLIN Superior Court. From an order of His Honor setting aside the verdict on the issue of damages and awarding a new trial, the defendant appealed.

Mr. Charles M. Cooke, for plaintiff.

Messrs. F. S. Spruill, W. B. Shaw and *T. W. Bickett,* for defendant (appellant).

FAIRCLOTH, C. J.: A verdict was recorded on all the issues submitted. On motion of the plaintiff the court set aside the verdict on the issue of damages and awarded a new trial on that issue. The defendant excepted to this ruling and order, and appealed to this court.

The appeal is premature. He should have noted his exception and proceeded with the trial and brought the whole case to this court on final judgment. This course would not affect any substantial right. This question has been so often decided as to need only a reference to *Hilliard* v. *Oram*, 106 N. C., 467, and the numerous cases cited.

Appeal dismissed.

J. G. COLLINS, et al., v. W. H. SWANSON.

Action to Recover Land—Title—Common Source of Title—Estoppel—Burden of Proof—Directing Verdict.

1. A defendant in an action to recover land, who sets up title through purchase of the land by his ancestor, is estopped to deny the title of the latter's grantor.
2. Where, in an action to recover land, plaintiff and defendant claim title from a common source, the plaintiff is required only to show the better title from such source.
3. Where, in an action to recover land, the defendant set up as title the alleged purchase of the land, by his ancestor, from the plaintiff's ancestor, J. S., and also pleaded the twenty years statute of limitations and admitted that plaintiffs were the heirs at law of J. S., and that the latter had died within 15 years prior to the commencement of the action, and the plaintiffs introduced testimony tending to show that the defendant had not been in possession of the land for 20 years; *Held*, that the burden of proof having been shifted upon the defendant, by the allegations in his answer and his admissions, to show a better title either by a valid conveyance from the common source to himself or his ancestor, or by making good his plea of the statute, it was error to non-suit the plaintiff.
4. Under no circumstances can a verdict be directed in favor of the party upon whom the burden of proof rests.

Civil action for the recovery of land, tried before *Timberlake, J.*, and a jury, at April Term, 1897, of Franklin Superior Court. Upon an intimation by His Honor that the plaintiffs could not, on their own testimony recover, they submitted to a non-suit and appealed.

Messrs. F. S. Spruill and *J. B. Batchelor*, for plaintiffs (appellants).

Mr. C. M. Cooke, for defendant.

Douglas, J.: This is an action in the nature of ejectment brought by the plaintiffs appellant, as heirs-at-law of Munford Collins, to recover certain lands in the alleged possession of the defendant. The defendant in his answer, denies the material allegations of the complaint, and pleads the Statute of Limitations, as having been in quiet and uninterrupted possession for more than twenty years under known and visible boundaries. In his amended answer he further says, "that in 1863, J. R. Swanson, the father of the defendant, and who has since died intestate, purchased the land in controversy of Munford Collins for the price of $100, which he paid him, and that the deed which he executed has been lost or mislaid, if any was made." Upon the trial it was admitted "that the plaintiffs are the heirs-at-law of Munford Collins who died in February, 1881, and that this action was brought to the October Term, 1895, of FRANKLIN Superior Court."

The plaintiffs introduced testimony to show, among other things, that the defendant had not been in possession of the land for twenty years. Upon intimation of His Honor that they could not recover upon their own testimony, the plaintiffs submitted to a non-suit and appealed.

In this intimation of His Honor we think there was substantial error. The defendant set up no title except the purchase of the land, by his ancestor, from Munford Collins. He is therefore estopped from denying the title of Munford Collins. *Ives* v. *Sawyer*, 20 N. C., 51; *Johnson* v. *Watts*, 46 N. C., 228; *Thomas* v. *Kelly*, Ibid, 375; *Feimster* v. *McRorie*, Ibid, 547; *Copeland* v. *Sauls*, Ibid, 70; *Gilliam* v. *Bird*, 30 N. C., 280. All that the plaintiffs are required to do, in order that they may recover, is to show a better title from the common source. *Gilliam* v. *Bird*, *supra; Caldwell* v. *Neely*, 81 N. C., 114; *Spivey* v. *Jones*, 82 N. C., 179; *Christenbury* v. *King*, 85 N. C., 229; *Mobley* v. *Griffin*, 104 N. C., 112; *Bonds* v. *Smith*, 106 N. C., 553. The defendant, being estopped from denying the title of Munford Collins and having admitted the plaintiffs to be the heirs-at-law of Munford Collins upon whom the law casts the title in the absence of some valid alienation, must show some better title in himself, either by a valid conveyance from the common source to himself or his ancestor, or by making good his plea of the statute of presumptions. He has done neither, having offered no testimony whatever. The allegation in the answer and the admissions of the defendant shifted upon him the burden of proof. Not only did the defendant fail to bear this burden, but the plaintiff's testimony strongly tended to rebut the plea of the statute. In view of the intimation of His Honor, that upon the plaintiff's own evidence they could not recover, this Court must consider all their evidence as true and regard it in the most favorable light for them, as the jury might so have regarded it had it been submitted to them. *Abernathy* v. *Stowe*, 92 N. C., 213; *Gibbs* v. *Lyon*, 95 N. C., 146; *Springs* v. *Schenck*, 99 N. C., 551.

The plaintiffs would have been clearly entitled to go to the jury, even if the burden had still rested upon them; but as the burden had been shifted to the defendant, under no circumstances could the Court have directed a verdict in his favor. *Spruill* v. *Insurance Co.*, 120 N. C., 141; *Hardison* v. *Railroad*, *Ibid*, 492.

For error in the intimation of the Court below, the nonsuit must be set aside and a new trial ordered.

New trial.

G. W. FORD v. ISRAEL GREEN.

Mortgagor and Mortgagee—Default in Mortgage—Right of Entry—Attornment of Mortgagor as Tenant of Mortgagee—Landlord's Lien, Priority of over Agricultural Lien of Third Party.

After forfeiture, a mortgagee can, by contract, become landlord of the mortgagor so as to avail himself of the landlord's lien which, though such contract be oral and unregistered, has priority over the subsequent liens for supplies furnished by third parties who, by the registration of the mortgage, are fixed with notice of the mortgagor's default and the mortgagee's right of entry. (CLARK, J., dissents *arguendo* in which MONTGOMERY, J., concurs.)

CIVIL ACTION, heard before *Timberlake, J.*, (a jury trial being waived) at April Term, 1897, of FRANKLIN Superior Court. The facts appear in the opinion of the Court. From a judgment for B. W. Ballard Company intervenor, the plaintiff appealed.

Mr. T. W. Bickett, for plaintiff (appellant).
Mr. F. S. Spruill, for G. W. Ford, intervenor.

DOUGLAS, J.: This is an action originally brought before a Justice of the Peace to recover possession, by virtue of an agricultural lien, of certain crops raised during the year 1896 by the defendant Green on lands alleged by the plaintiff to have then belonged to said Green. The defendant, the Ballard Co., intervened and claimed title to the crops as the Landlord of the defendant Green. The plaintiff introduced his lien dated January 22, 1896, and filed for record January 24, 1896. The intervenor introduced his landlord's lien dated Feb. 26, 1896, and filed for registration May 25, 1896.

B. W. Ballard, on behalf of The Ballard Co., testified that the company "was the assignee and owner of a mortgage on said land, which mortgage was duly executed by Israel

Green and wife. This was expressly admitted. It was also admitted that the debt secured by the mortgage was unpaid. Ballard further testified that in 1893 the defendant Green, finding he could not pay the mortgage, agreed to become the tenant of the Ballard Co., surrendered the possession and remained on the land as such, paying an annual rental of $100; that at the same time said Company agreed with Green that if he would within one year pay the Company $1,000, which was less than the mortgage debt, then the Company would cancel the mortgage and all claim on the land; that defendant Green under this contract had remained on the land since 1892, recognizing the Ballard Company as his landlord and paying $100. a year rent, and that each year the Company had renewed its proposition to surrender all claims on the land on payment of the $1,000, and that every year since the above agreement in 1893 the Company had taken a crop lien for the said rent and advances."

It appears that Green still owes the plaintiff $48.95 on the debt secured by the crop lien, which it was admitted covered the crops in controversy. It was admitted that the value of the crops sought to be recovered was not over $50, and that Israel Green had an absolute deed to the land on which the crops were raised, and lived on the land. He corroborated B. W. Ballard as to the said agreement, and the plaintiff admitted the facts testified to, and also admitted that The Ballard Company had not been paid in full for advances made during 1896 to Green, and admitted that if the lien of the Company had priority over his lien; then judgment should be entered for the Company. Upon the whole evidence the court held that the Company was the landlord of Green, and that its lien had priority over the lien of the plaintiff, and rendered the judgment set out in the record, to which the plaintiff excepted and appealed.

We see no error in the ruling. Admitting that the agreement testified to by Ballard did not change the relations of mortgagor and mortgagee existing between the Ballard Company and Green, and that the right of redemption still remained in Green, the possession of the land was changed by the entry of the Company and the attornment of Green. The Ballard Co. was thereafter, in any view of the case, at least the *mortgagee in possession* and therefore entitled to the rents and profits. That it rented the land to a tenant, who happened to be the mortgagor, did not change the character of that tenant's possession, which was thereafter that of his landlord. The entry of the mortgagee, being matter in *pais*, was incapable of registration. The agreement to rent might have been registered, but did not require registration, as it was only for one year, and renewed from year to year. As the mortgage held by the Ballard Company was "expressly admitted," it is to be presumed that all its necessary incidents, such as registration and default, were also admitted, as they are no where denied. This mortgage being registered was notice to the world, not only of its existence, but necessarily of all that it contained. Any one examining the record, and examination is presumed from the opportunity, would be fixed with notice that the mortgage was in default and that the consequent right of entry had accrued to the mortgagee. The actual entry of the mortgagee was not during the current year while the crops in question were growing, but was more than two years before they were planted or any of the supplies furnished therefor. This takes the case at bar clearly out of the rule laid down in *Killebrew* v. *Hines*, 104 N. C., 182, so strongly relied on by the plaintiff. That case, while maintaining the just principle that a mortgagee cannot enter and take possession of growing crops to the prejudice of pre-existing mortgagees or lienees, clearly recognizes the right of the mortgagee to enter upon condition broken, and this right is sustained by every authority cited therein. The concurring opinion of Justice Merrimon, reconciling *Killebrew* v. *Hines* with the earlier cases, is worthy of attention. The later cases of *Taylor* v. *Taylor*, 112 N. C., 27, *Crinkley* v. *Egerton*, 113 N. C., 444 and *Jones* v. *Jones*, 117 N. C., 254, do not affect the principle now under consideration. Can there be any question of a mortgagee's right of entry upon breach of condition? He had it at common law. 1 Pingrey on Mortgages, Sec. 886. He has it now in all States where the legal title is held to vest in the mortgagee. Ibid, Sec. 826; 2 Jones Mortgage, Sec. 1253; *Killebrew* v. *Hines, supra*, and cases therein cited.

In *Jones* v. *Jones, supra*, this court has expressly held that, after forfeiture, the mortgagee or vendor can by contract become landlord of the mortgagor or vendee, so as to avail himself of the landlord's lien.

We are unable to distinguish the *Jones* case from the case at bar, as the attornment so unequivocally approved, in the former case, was in the latter case made when there were no conflicting liens, and all subsequent lienees are charged with knowledge of the mortgagee's right of entry.

This view of the case renders it unnecessary for us to consider when and under what circumstances a mortgagor can abandon or release his equity of redemption. It should be borne in mind that this opinion does not deal with any question of *actual* fraud, or fraud in fact, as the case comes to us on a bare question of law. No error appearing in the record, the judgment is affirmed.

Affirmed.

CLARK, J., dissenting. The Ballard Company intervenor did not claim to be mortgagee in possession, which would have been an open and notorious fact, but rested the case upon its being landlord by virtue of an oral surrender of the equity of redemption by the mortgagor, and that is found as a fact by the jury. It was admitted by both parties that upon that fact the case depended. In *Killebrew* v. *Hines*, 104 N. C., 182, it was held that the lien of a creditor who makes advances to the mortgagor to make a crop is superior to that of the mortgagee of the land, because till the entry of the mortgagee the latter is assenting to the mortgagor's holding himself out as owner of the crop. In *Taylor* v. *Taylor* 112 N. C., 27, it was held that while a vendee, or mortgagor in default, remains in possession of land, the title to the crop is not vested in the mortgagee, or vendor, as landlord. *Crinkley* v. *Egerton*, 113 N. C., 444, cites with approval both these cases as applicable where the relation is *simply* that of vendor and vendee, mortgagor and mortgagee, and holds that in such cases there is no landlord's lien for rent, but held further in favor of the freedom of contracting that, when there is no oppression, it is competent for the parties to a mortgage for the purchase money to stipulate that, in addition to the mortgage on the purchased land, the vendor should have a lien on the crop to the extent of the rent, the same to be applied on the purchase money and that when such mortgage is recorded one who advanced supplies upon a later mortgage on the crop took subject to vendor's mortgage on the rent. In *Jones* v. *Jones*, 117 N. C., 254, it was held, approving *Taylor* v. *Taylor*, *supra*, and *Crinkley* v. *Egerton*, *supra*, that the vendee of land in default may by contract, in the absence of oppression, agree verbally that the vendor may have as additional security the landlord's lien for rent, the amount of same to go upon the purchase money.

There is this difference between *Crinkley* v. *Egerton* and *Jones* v. *Jones*, that in the first named case the agreement to give the mortgagee the rights of a landlord over the rent, was embraced in the mortgage which was registered and hence the person subsequently taking a mortgage upon the crop for advances was fixed with notice of it and hence the mortgagor's right to the rent as against such third party was sustained.

In *Jones* v. *Jones*, however, the agreement to give the vendor the benefit of the landlord's lien upon the rent as additional security was verbal, and it was sustained as between the parties merely.

In the present case there was a similar verbal agreement. This was good as between the parties, as was held in *Jones* v. *Jones*, *supra*, but it can not be good as to third parties as in *Crinkley* v. *Egerton*, because unlike that case the agreement was not in writing and recorded and third parties had no notice from any registration. Nor is there any evidence tending to show that the merchant who advanced the supplies had any actual notice, if indeed under Connor's Act his registered mortgage for supplies could be defeated by a verbal conveyance back of the land from the vendee to the assignee of the vendor who had been secured by a mortgage upon the land only, more especially as the mortgagor, notwithstanding the verbal reconveyance, remained in possession.

If the merchant making advances in *Killebrew* v. *Hines* had examined the books in the Register's office he would have found that his customer had executed a mortgage on his land only and therefore could give him a valid mortgage on the crop. If such merchant had examined the records in *Crinkley's* case he would have found that his customer had not only mortgaged his land but had conveyed a lien on the rent also as additional security, so that he could only get a valid lien for his advances on the crop over and above the rent. If the merchant making advances in the present case examined, as we must presume he did, the Register's books, he would have found that, as in *Killebrew* v. *Hines*, the party in possession had given a mortgage only on the land (and not as in *Crinkley's* case conveyed the rent also) and therefore he is entitled to the crop as it was mortgaged to him and can not be defeated by a parol agreement which, being unregistered and unknown to him, was only good between the parties as in *Jones* v. *Jones*, *supra*. Even in *Crinkley's* case the merchant had his lien on all the crop except the rent. Here, it is sought by a verbal agreement between mortgagor and mortgagee to defeat the merchant's lien for advances not only as to the rent but as to the whole crop.

The wise object of the Act of 1885 (known as Connor's Act) was to require all conveyances and encumbrances upon land to be spread upon the Record so that third parties could always be protected. Looking at the record here, the merchant was justified in taking from the mortgagor of the land in possession a mortgage upon his crop. To permit an unknown verbal agreement for the conveyance of land to the mortgagee, by way of a verbal surrender of the equity of redemption, to destroy the mortgage on the crop which was given the merchant by the party in possession claiming to be owner (subject only to the mortgage on the land) would be contrary to the letter and the spirit of the Act of 1895, (*Barbee* v. *Wadsworth*, 115 N. C., 29) and would unsettle the confidence of all who make advances to mortgagors and vendees in possession to enable them to raise their crops.

MONTGOMERY, J.: I concur in the dissenting opinion.

MARY L. TAYLOR et al., v. SARAH SMITH, et al.

Action to Enforce Parol Trust in Land—Lis Pendens, Discontinuance of—Purchasers Without Notice—Color of Title.

Where, in an action to have a parol trust declared in land and to have the legal estate conveyed accordingly, a verdict was rendered in 1875 for the plaintiff and a *nunc pro tunc* judgment fixing the parol trust was rendered on the verdict in 1880, and the subsequent proceedings in said action were directed to other purposes than to establish such parol trust, deeds for parts of such land made by the holder of the legal estate in 1877 or 1885 to grantees, who went into possession and held aversely to all the world and were not made parties to the action until 1893, were color of title which ripened into full title by seven years possession.

CIVIL ACTION heard before *Timberlake, J.*, at Spring Term, 1897, of CRAVEN Superior Court, on exceptions to the report of a Referee. The plaintiffs appealed from the judgment overruling certain exceptions which are referred to in the opinion.

Mr. W. D. McIver, for plaintiffs (appellants).
Messrs. Simmons & Ward, for defendants.

MONTGOMERY, J.: The plaintiffs in their complaint allege that Spicer Lane and his wife, Ada, on the 21st day of October, 1849, conveyed two tracts of land in CRAVEN county, particularly described by metes and bounds, to Thompson G. Lane, with a trust in parol attached to the effect that after the payment, by the said Thompson G., and other children of Spicer Lane and his wife Ada, of a certain debt of $950, with interest due by the father, to John S. Lane, the land should belong to the children of the said Spicer and Ada, who were the said Thompson G. Lane, Mary, who afterwards married the other plaintiff, Jane, who afterwards married William Wilcox, Daniel, and Mason and Wiley, who died intestate and without issue; and that Thompson G. should convey to each his or her proportionate part of the land. Originally, the plaintiffs in the action were Mary and her husband, Benaja Taylor, and the defendants were the widow of Thomas G., Sarah, the only child and heir-at-law of Thomas G., and John Wilcox, George Wilcox and S. Williams Wilcox, the children and heirs-at-law of Jane. The successive administrators of Thompson G. were afterwards made parties.

The action was brought to have the parol trust upon the land declared, and to compel the said Sarah, who intermarried with B. J. Smith, to convey to the plaintiff Mary, one half of the land and the residue to the Wilcox children.

Thomas G., in his lifetime, had conveyed to C. J. Dudley 460 acres of the land at the price of $2,300, and had received the same in cash. Daniel Lane, and John and William Wilcox had conveyed their interest in the land to the plaintiff. Mary.

At Spring Term, 1875, of the Superior Court of Craven County, two issues were submitted on the trial, first, Was there a parol trust in favor of the children of Spicer Lane annexed to the conveyance of October 1849?. And second, Had the defendant Dudley, previous to or at the time of his purchase, notice of such trust? The answer to the first issue was Yes, and to the second, No.

At the Fall Term of 1880 of the Court, a judgment was rendered upon the verdict, *nunc pro tunc*, and entered as of the Term when the verdict was rendered in the following words:

SUPERIOR COURT, } No. 204.
CRAVEN COUNTY. } Fall Term, 1869.

Benaja Taylor and Mary Taylor, his wife,
Against
Christopher J. Dudley, Nathaniel H. Street, Admr. of Thompson G. Lane, Amanda Lee and Sarah Lane.

Now, December 10th, 1880, it is ordered and adjudged by the Court that judgment be entered upon the findings of the jury upon issues submitted to the jury as follows.

1st. In favor of the defendant Dudley for the land in controversy as embraced in his deed from Thompson G. Lane.

2nd. In favor of the plaintiff and against Nathaniel H. Street, administrator of Thompson G. Lane, deceased, and Amanda Lee and Sarah Lane for the proportion of the said plaintiffs of the fund realized from the sale of the trust estate with interest from the time the same was received by Thompson G. Lane, and it is further ordered and adjudged that E. W. Carpenter, clerk of this court, be and is hereby appointed a commissioner to state an account in accordance with the decision of the Supreme Court, filed in this case and report to the next term of this court. This judgment is in accordance with the agreement of the parties to be *nunc pro tunc* and entered as of the term when the verdict was rendered.

J. F. GRAVES,
Judge presiding."

In June, 1877, Freeman H. Gaskins and E. H. Anderson, each, bought a part of the land described in the complaint, from Daniel Lane, guardian of the defendant Sarah Smith. These guardian sales were confirmed by the Court and deeds executed to the purchasers for the several tracts of land, at or about the time of the sales, and the purchasers went into immediate possession of the land conveyed to them. On November 27, 1885, Freeman H. Gaskins purchased of the defendant Sarah Smith, and her husband B. J. Smith, another part of the said lands mentioned in the complaint, took a deed therefor and went into immediate possession of the same. In 1884, an order of dismissal of the action was made, and after the year 1886 the cause remained off the docket until the Fall Term of 1892 of the Superior Court of Craven county, when it was re-instated in the following words:

"NORTH CAROLINA, } SUPERIOR COURT, 1892.
} Number 204 and 205
CRAVEN COUNTY. } Fall Term '69, consolidated.

Mary L. Taylor
vs.
Sarah Smith, Amanda Lee, John Wilcox, William Wilcox, GeorgeS. Wilcox and J. C. Harrison, Admr. of T. G. Lane, dec'd.

ORDER OF REFERENCE.

This cause coming on to be heard upon plaintiff's motion, by consent it is ordered, That J. C. Harrison, Admr. D. B. N. of T. G. Lane, dec'd. and B. J. Smith, husband of Sarah Smith, be admitted to become parties defendant:

That this cause be restored to the docket from which it was dropped by error of the Clerk:

That order consolidating the two actions be entered now as of the judgment formerly made in this action:

That Owen H. Guion be appointed in the stead of E. W. Carpenter to take the account ordered in this action, and that he proceed to take the same on May 26th, 1892, and report to the next term of this Court; ascertaining how much of the purchase money was paid by each of the children of Spicer Lane, and when paid, the value each year of the lands described in the complaint, and who received the same and all such other questions as may be raised by the pleadings and not decided by the verdict and necessary to be tried in the determining of this action in accordance with the opinion of the Supreme Court handed down in this action.

This May 14th, 1892.

HENRY R. BRYAN,
Judge 2nd Judicial District.

W. D McIVER, Plaintiff's Att'y.
CLARK & CLARK, Att'ys for Def'ts"

That order of reference was vacated at a subsequent term of the court, but at the Fall Term of 1893, another order of reference to O. H. Guion was made, similar in character to the former one. A report was made by the referee to the Spring Term of 1895, and exceptions were filed thereto by the plaintiff and defendants Smith and wife. The exceptions to the findings of fact by the referee were not argued here. None of the testimony was printed, and the Court, therefore, could not tell whether the referee made any of his findings upon a total lack of testimony, or not. The 7th conclusion of law found by the referee, is in the following words: "While finding, as a conclusion of law, that this cause has been regularly and lawfully re-instated for the purposes of all orders and decrees made herein, I find that for the purpose of *lis pendens*, owing to the negligent omission, and intermission existing from the year 1875, and upon the order of dismissal entered at the Term of 1884, being in effect a discontinuance of said cause, an intermission of and failure of full prosecution has occurred, which is fatal to the continuity of the *lis pendens*, as existing upon the filing of the complaint in said action, and therefore the deeds to Gaskins and Anderson recited in the findings of fact are not affected by the pendency of said actions and said purchasers take without notice thereof."

The plaintiffs excepted to this conclusion of law and the exception was overruled by His Honor. We think there was error in the ruling of the Court on this point, but the error is harmless as we shall presently point out.

The verdict and judgment of 1875 was a full and final adjudication in favor of the plaintiffs that the parol trust did attach to the whole of the land conveyed to Thomson G. Lane by Spicer Lane and his wife, in 1849. C. J. Dudley, however, who purchased 460 acres of the land without notice of the trust, was in the same verdict and judgment protected in his purchase. Gaskins and Anderson who purchased parts of the land, were made parties to this action at the February Term, 1893, of Craven Superior Court. In their answer, they deny all the material allegations of the complaint and set up a further defence that their purchases were in good faith and for value, and that under their deeds they went into immediate possession and have been holding the lands therein conveyed, adversely, from the time the deeds were made.

We are of the opinion that the deeds to the defendants Gaskins and Anderson, made in 1877, and in 1885, as hereinbefore recited, were color of title, having been made after the verdict and judgment in this case fixing the parol trust on the land; and the defendants having held the land in possession so conveyed to them for more than seven years, adversely to all the world, have obtained a title in fee. All of the proceedings made in the cause since the verdict and judgment of 1875, have been directed to other purposes than the one to establish the parol trust upon the land. The defendants, Gaskins and Anderson, were not parties to these proceedings until their color of title had ripened into a full title by the seven years adverse possession.

His Honor was right in his rulings upon the other exceptions filed by the parties to the report of the referee, and the judgment rendered by the Court was, in all things, correct, and the whole is affirmed.

Affirmed.

E. A. JOHNSON, Executor of Frank Palmer v. J. C. MARCOM.

Practice—Modification by one Judge of Judgment rendered by Another—Executors and Collectors—Counsel Fees—Jurisdiction.

1. One Judge has no power to reverse or set aside, in whole or in part, a final order or judgment rendered by another Judge except on notice and a showing that there was on the part of the complainant mistake, inadvertance, surprise or excusable neglect by which he was injured.
2. A collector of the estate of a decedent who resists the claim of the executor of the estate to a fund in his hands which, after litigation, is awarded to the executor, is not entitled to an allowance for counsel fees paid by him in such litigation.
3. The allowance of expenditures of a collector of an estate is, under Section 1524 of *The Code*, within the original jurisdiction of the Clerk of the Superior Court and the Court at Term has no power to make an allowance to the collector for counsel fees paid by him in a litigation in which he attempted to defeat the rightful claim of the executor to a fund in his hands.

MOTION by defendant for allowance for counsel fees paid by him as collector and to that extent to modify a judgment rendered against him at a former Term by *Boykin, J.*, heard at February Term, 1896, of WAKE Superior Court before *Adams, J.* The motion was allowed and plaintiff appealed.

Messrs. Battle & Mordecai, for plaintiff (appellant).
Messrs. Argo & Snow, for defendant.

MONTGOMERY, J.: A caveat was filed to the will of Frank Palmer, deceased, on the 28th of May, 1895, the day after the will was admitted to probate before the clerk of the Superior Court of Wake County. The executor E. A. Johnson, was removed without notice and without fault, and the defendant Marcom was appointed collector of the decedent's estate. These orders of the clerk, on the appeal of the executor, were reversed at the next term of the Superior Court and the ruling of that court affirmed, on the appeal of defendant, by this court. The executor Johnson upon being re-instated demanded of the defendant an amount of money which he had received, as collector, on the 24th of July, 1895, from the Life Insurance Company of Virginia on the policy of the testator, and upon refusal the action was begun in which the order now before us for review was made.

The case was tried at the October term, 1896, and the plaintiff recovered judgment against the defendant Marcom and the sureties on his bond, as collector, for the penalty of the bond to be discharged upon the payment of the sum of $120., the amount of the policy of insurance, the interest and costs. At the February term following, the defendant made a motion, without notice and without any allegation, that the judgment against him was taken through his mistake, inadvertence, surprise or excusable neglect, asking to be allowed by the court to retain out of the amount still remaining in his hands the sum of $30.00, which he alleged he had paid to his counsel. His Honor made an order in the following words: "This cause coming on, upon motion to allow counsel fees of $30.00 which said collector contracted in his defence of the possession of the estate of Martin Palmer deceased, and it appearing to the court that the same are reasonable and have been actually paid to counsel: it is considered and adjudged that said collector be and is hereby allowed the said sum of $30.00 as counsel fees and that the same be deducted from the fund still remaining in his hands, upon final payment of the same."

There was error in the making of this order. The judgment in the original action was a final judgment, and one Superior Court Judge can not reverse or set aside, in whole or in part, the judgment or order of another Judge except upon notice, and for the reason that in the rendering of the judgment there was on the part of the complainant mistake, inadvertence, surprise or excusable neglect, by which he has been injured. *Henry* v. *Hilliard*, 120 N. C., 479; *Code*, Sec. 274. The defendant cannot complain that the allowance he seeks to reimburse him for fees paid to counsel is defeated by a purely technical rule of court practice. He is not entitled to the allowance upon the merits. In the action he did not render any service for the benefit of the estate of the testator, but on the other hand he did his utmost to defeat the claim of the executor. He denied the right of the executor to recover, and averred that the amount in dispute was the property of one Mary Lyon, and "that said policy and money were not of the assets of the estate of Frank Palmer, deceased, were not received as such by said Marcom and do not belong to the estate." The defendant really was aiding one whose claims were adverse to that of the plaintiff. He was not even professing to act for the benefit of the estate of Frank Palmer, directly or indirectly, and the question therefore of the allowance of reasonable counsel fees to persons who act in a fiduciary capacity does not arise and need not be discussed.

If His Honor intended as it seems he did, to base his order upon the fact that the defendant had taken care of the estate of the testator during the time he was acting collector, and that he ought to be compensated for that service, he had no power to make such allowance, for that matter is in the original jurisdiction of the Clerk of the Superior Court. *Code*, Section 1524.

Reversed.

A. A. BRIGHT v J. C. MARCOM, Administrator of S. J. Nichols.

Action on Note—Witness—Transaction with Deceased Person.

In the trial of an action on a note, although the payee is a competent witness to prove the handwriting of a witness thereto, whether the maker of the note be living or dead, yet he cannot testify, if the maker be dead, that one who purports to have made his cross mark to a paper, as witness, did in fact make his mark thereto, since that would be testimony concerning the transaction between the plaintiff and the deceased.

Civil action on a note executed by S. J. Nichols and Selina Nichols, tried before *Boykin, J.*, and a jury at October Term, 1896, of Wake Superior Court on appeal from a judgment of a Justice of the Peace.

The plaintiff was introduced as a witness in his own behalf and offered to testify that he saw Guy Taylor, the alleged witness to the note, make his mark in his name under the word "witness" upon the note in the presence of the maker of the note (both of whom are dead) at the time the note purports to have been executed, the said witness—Guy Taylor—having also since died. The defendants objected, but plaintiff was allowed to testify that at the time the note purports to have been executed Guy Taylor was present, and he saw him make his mark as witness thereto.

The note, including the signatures of the makers and the subscribing witness, was in the handwriting of plaintiff, and the cross mark appearing upon the note in the name of Guy Taylor, under the word witness, was made in the presence of the plaintiff by said Guy Taylor. There was no distinctive characteristics about the marks; they were simply the ordinary cross marks.

The jury found the issue in favor of the plaintiff, and from the judgment thereon the defendant appealed.

Messrs. Jones & Boykin, for plaintiff.
Mr. J. C. L. Harris, for defendant (appellant).

CLARK, J.: When an action is brought by the payee upon the promissory note of a deceased maker, the plaintiff is competent to prove the handwriting of the deceased (*Peoples* v. *Maxwell,* 64 N. C., 313; *Rush* v. *Steed,* 91 N. C., 226; *Ferebee* v. *Pritchard,* 112 N. C., 83; *Sawyer* v. *Grandy,* 113 N. C., 42; *Sumner* v. *Candler,* 86 N. C., 71; *Hussey* v. *Kirkman,* 95 N. C., 63; *Buie* v. *Scott,* 107 N. C., 181,) because knowledge by the witness of the handwriting of the deceased is no part of the transaction between them, but the same cases hold that the payee would be incompetent to prove that he saw the deceased sign, or the contents of the paper if lost, or the date or circumstances of its execution, since that would be to prove what passed and was transacted between the witness and the deceased. So, also, where the execution of the note is by a cross mark purporting to be affixed by one since deceased, it is not competent for the payee to testify that the cross mark was affixed by the deceased, since that is to testify as to the transaction between them, and as to which the other party is prevented by death from replying. *Spivey* v. *Rose,* 120 N. C., 163.

The witness to a note, bond or deed is the witness of the parties. He is not a volunteer, but he signs at their request, and must always be called to prove the execution of the writing, or his death shown or his absence accounted for, and even then his handwriting should be shown if possible. *Jones* v. *Brinkley,* 2 N. C., 20; *McKinder* v. *Littlejohn,* 23 N. C., 66; *Carrier* v. *Hampton,* 33 N. C., 307; *Miller* v. *Hahn,* 84, N. C., 226; *Howell* v. *Ray,* 92 N. C., 510; *Angier* v. *Howard,* 94 N. C., 27; *Code,* Section 1246.

Therefore, while the payee is competent to prove the handwriting of the witness to the note, whether the alleged maker is living or not, he cannot testify, unless the maker is living, that one who purports to have made his cross mark to a paper as witness in fact did make his mark thereto, as that would be to testify that, at the request of the deceased maker and himself, the said person was witness to the transaction, thereby proving the transaction. *Ballard* v. *Ballard*, 75 N. C., 190.

Error.

SINGER MANUFACTURING COMPANY v. J S. DRAUGHAN, et. al.

Contract—Continuing Guaranty—Surety, Liability of—Revocation of Guaranty.

A surety for the faithful performance of duty by an agent, in an obligation of the form called a "continuing guaranty," has the right to withdraw from such obligation by giving notice to the principal, and is not liable for any defaults of the agent in matters entrusted to him after the service of such notice.

CIVIL ACTION brought upon the bond of J. S. Draughan, agent of the plaintiff, The Singer Manufacturing Company, against said Draughan and his sureties J. J. Wade and H. A. Hodges, tried before *Adams, J.*, at February, 1897, Term of WAKE Superior Court, upon the pleadings and a referee's report.

A jury trial was demanded but was waived and His Honor found the facts by consent. Judgment was rendered for the plaintiff and the defendant, J. J. Wade, appealed.

Mr. F. H. Busbee, for J. J. Wade (appellant).
No counsel *contra*.

FURCHES, J.: The defendant Draughan was the agent of the plaintiff for selling its machines, and as such agent he entered into a written undertaking for the faithful performance of his contract, in accounting for and paying over to the plaintiff all monies collected by him under said agency, with the defendant Wade, as his surety.

This undertaking is called a continuing guaranty in which the following language is used: "The condition of the above obligation, which is expressly intended as a continuing guaranty", and bears date the 3rd day of July, 1890. On March 4th, 1893, the defendant Wade notified the plaintiff by letter that he would not be responsible as surety of defendant Draughan after the receipt of this letter by the plaintiff. It was admitted by the plaintiff that it received this letter, to which it made no reply.

The plaintiff complained for a breach of this undertaking, and the defendant Wade answered admitting that he signed the contract sued on and that he was liable for such breaches as had occurred before the receipt of his letter of the 4th of March, 1893, but denied that he was liable for any breach committed by the agent Draughan since that time.

The matter was referred to Alexander Stronach to take and state an account of this agency. Stronach took the account, and reported that Draughan was indebted to the plaintiff on account of said agency in the sum of $444.62 with interest on the same at the rate of 6 per cent. from the 10th day of October, 1893, to-wit, $86.68, and the costs of this action to be taxed by the clerk", and the referee was allowed $25, to be taxed as costs. The referee does not find what part of this sum of $444.62 arose from breach before the receipt of the letter of the 4th of March, 1893, nor does he find when said letter was received by the plaintiff, but it was admitted on the trial that a large part of the sum found due the plaintiff arose from transactions after the receipt of that letter. The defendant Wade excepted to the report of the referee, and alleged that he was only liable for that part which accrued before the plaintiff received his letter of the 4th of March, 1893. But the court was of a different opinion and gave judgment against the defendant Wade for the whole amount. In this there is error.

This undertaking was a "continuing guaranty" for the faithful discharge of duty, by the plaintiff's agent Draughan. The plaintiff could have discharged Draughan at any time, or could have refused to furnish him any more machines. And if plaintiff continued him in its employment and furnished him with other machines after it received the defendant Wade's letter, saying that he would not be longer liable for Draughan's agency, it did so at its own risk. 1 Parson's Contracts, 517 (3rd Edition); "Revocation of Guaranty"; *Bostwick* v. *Van Vorhis*, 91 N. Y.,353; *La Rose* v. *Bank*, 102 Indiana, 332. These cases cited from New York and Indiana sustain the principle enunciated in Parson's, *supra.*, though, as they relate to bank cashiers, it was held that the notice of the withdrawal of the surety could not be allowed to take effect until the cashier had a reasonable time to get other sureties. This distinction was put on the ground of public policy, as the bank was a public institution. But no such reason applies in this case.

This case falls under that of the *Howe Machine Co.* v. *Farrington*, 82 N. Y., 121, which is very much like this. The defendant Wade must be held liable to the plaintiff for all machines or monies arising from the sale of machines that went into the hands of the agent Draughan before the plaintiff received the defendant Wade's letter of the 4th of March, 1893, but not for those furnished him after that date. There is a distinction between future liabilities and a suretyship for a debt where the consideration has passed. But this distinction we do not discuss in this opinion.

For the error pointed out, the case should be recommitted to the referee with instructions to ascertain the date of the receipt of the letter of defendant Wade of the 4th of March, 1893, revoking his suretyship for the agent Draughan, and the amount for which Draughan is liable to the plaintiff upon machines furnished him before the receipt of the said letter.

Error.

W. H. J. GOODWIN v. CARALEIGH PHOSPHATE AND FERTILIZER WORKS.

Practice—Amendment—Discretion of Judge—Appeal.

1. A motion to amend a complaint after answer has been filed will not be allowed as a matter of course
2. The allowance or refusal of a motion to amend pleadings is a matter within the discretion of the trial Judge and no appeal lies therefrom.

MOTION by plaintiff in a civil action pending in WAKE Superior Court to amend the complaint by inserting a second cause of action, heard before *Robinson, J.*, at September Term, 1897, of said Court. The motion was refused and plaintiff appealed.

Messrs. J. C. L. Harris, Douglass & Holding and B. M. Gatling, for plaintiff (appellant).

Messrs. Spier Whitaker and E. C. Smith, for appellee.

FAIRCLOTH, C. J.: The plaintiff sued for a penalty of $200, before a Justice of the Peace, and the defendant denied the allegations of the complaint and pleaded the statute of limitations. On appeal in the Superior Court, the plaintiff asked leave to amend his complaint by inserting a second cause of action, which was refused. He claimed the right, as of course, under *The Code*, Sec. 272. The motion, coming after the time for answering had expired and after answer had been filed, was too late, as a matter of course. The privilege of amending pleadings is at the discretion of the court, and its decision is not reviewable. *Commissioners of Alamance* v. *Blair*, 76 N. C., 136; *Kron* v. *Smith*, 96 N. C., 389; *Clark's Code*, pp. 220.

Affirmed.

WILLIAM SMITH v. B. F. MONTAGUE.

Practice—Appeal—Docketing Appeal—Motion to Dismiss—Printing of Record.

1. Although, under Rule 17, the appellee may move to dismiss an appeal for appellant's failure to docket the same within the first two days of the call of the docket as required by Rule 5, yet such motion is too late if not made promptly and before the appellant actually dockets the appeal within the week but after the second day of the call.
2. The rule requiring the record on appeal to be printed is complied with if the printing has been done when the case is called for argument.

MOTION of appellee to dismiss an appeal in an action tried before *Adams, J.*, at April Term, 1897, of WAKE Superior Court.

Mr. M. A. Bledsoe, for plaintiff (appellant).
Messrs. Jones & Boykin, for defendant.

CLARK, J.: Under Rule 5, as amended (119 N. C., 930) an appeal must be docketed "during the first two days of the call of the docket of the district to which it belongs" at the first term of this court which begins after the trial below. "During the first two days of the call" means on Tuesday or Wednesday of that week, as by Rules 7 and 61 (119 N. C., 931 and 954) the call of any District begins on Tuesday. By Rule 17 (119 N. C., 935,) if the appeal is not docketed during said two days (Tuesday and Wednesday) the appellee may docket the certificate prescribed in that Rule and have the appeal dismissed.

In the present case, the appeal was not docketed during Tuesday or Wednesday of the week appropriated to the district to which it belonged. On Friday, the appellee moved to dismiss, though without filing the certificate required by the Rule, the absence of which would necessarily have caused his motion to be denied.

But there is another objection to granting his motion. While the appellee was delaying to make the motion, the appellant on Thursday filed his transcript of the record. Though this was after the time limited, it having been done before the motion to dismiss was made rendered the motion nugatory. This has been expressly decided heretofore in *Triplett* v. *Foster*, 113 N. C., 389, and cases there cited. The only change in the Rule is that appeals must be docketed in the first two days of the call of the District, instead of allowing as formerly the whole week in which to docket appeals —a change which was made that counsel should not be detained here the whole week, lest the opposite party might docket an appeal towards the end of the week, but which does not affect the decision in that case, which is that, if the appellee does not move to dismiss as early as he may, and in the meantime the appellant shall docket his appeal before the motion to dismiss, though after the time allowed for docketing, the appeal will not be dismissed.

If the appellee has a right to take advantage of the appellant's want of diligence in docketing his appeal within the first two days of the call of the docket as required, the appellant can avail himself of the appellee's dilatoriness in not moving to dismiss till after the appellant has cured his negligence by actually docketing the appeal. *Triplett* v. *Foster, supra,* has been cited and approved in *Paine* v. *Cureton,* 114 N. C., 606; *Haynes* v. *Coward,* 116 N. C., 840 and *Speller* v. *Speller,* 119 N. C., 356.

The appellee also moves to dismiss because the judgment has not been printed. This would be good ground for dismissal if the cause had been reached for argument. Rule 28 (119 N. C., 940); *Thurber* v. *Loan Asso.,* 118 N. C., 129. In *Witt* v. *Long,* 93 N. C., 388, it is said that while it is better and more convenient to have the record printed as soon as the appeal is docketed in this court, yet the rule is complied with if the record has been printed when the cause is called for argument, and this was reaffirmed in *Walker* v. *Scott,* 102 N. C., 487.

Motion denied.

J. A. SCOTT v. K. B. SMITH AND SAMUEL HINNANT.

Equitable Remedy Not Proper When Action for Damages Will Lie.

Application for an injunction against the enforcement of a town ordinance alleged to be void is a misconception of remedy, as a Court of Equity will not interpose when the plaintiff's proper remedy is a civil action at law for damages.

This was a motion to dissolve a restraining order in an action pending in WAYNE Superior Court, heard before *Robinson, J.,* at Chambers at Goldsboro, on 27th July, 1897. The motion was denied and the defendants appealed.

Mr. W. C. Monroe, for plaintiff.

Messrs. Allen & Dortch, for defendants (appellants).

FAIRCLOTH, C. J.: The commissioners of the town of Pikeville passed an ordinance declaring it unlawful and punishable by fine to play baseball, foot-ball &c., within the corporate limits of the town without permission of the Mayor, who is one of the defendants, and the plaintiff brings this action to restrain the threatened enforcement of the ordinance by the defendant, Mayor, on the ground that the ordinance is void and in violation of the constitution, in that it deprives the citizens of their "liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness."

If the ordinance is lawful and valid, as insisted by the defendants, the plaintiff has no cause of complaint and can maintain no form of civil action. If it is void, as insisted by the plaintiff, then he has misconceived his remedy, for a court of equity will not interpose when the plaintiff has a remedy at law by civil action for damages, in which, and in a criminal action also, the validity of the ordinance would be presented. At present we do not express any opinion upon that question. *Cohen* v. *Commissioners of Goldsboro*, 77 N. C., 2; *Wardens* v. *Washington*, 109 N. C., 21. The injunction is dissolved and the action dismissed.

J. R. SHORT v. T. E. YELVERTON.

Trial—Evidence—Irrelevancy of Evidence—Collateral Facts.

1. To make evidence competent it must tend to prove the matter in dispute and not relate to collateral facts merely.
2. Where, in the trial of an action for the price of goods alleged to have been sold to the defendant, the contention was whether the sale was made to the defendant or his tenants and the defendant denied the purchase and introduced his tenants who testified that they bought the goods from plaintiff on their own account, at a certain price, it was error to permit plaintiff to prove that the goods cost him what defendant's witnesses claimed to have bought them for in order to show the unreasonableness of their testimony, since such matter was collateral to the issue and not a part of the *res gestae*. (Clark, J., dissents, *arguendo*.)

CIVIL ACTION tried before *Robinson, J.*, and a jury, on appeal from the judgment of a Justice of the Peace, at Fall Term of WAYNE Superior Court. There was a verdict for the plaintiff and from the judgment thereon defendant appealed, assigning as error the admission of certain evidence referred to in the opinion of the Court.

Messrs. Allen & Dortch, for plaintiff.
Mr. W. C. Monroe, for defendant (appellant).

FURCHES, J.: This action was brought to recover the price of fertilizers which the plaintiff alleges he sold to the defendant and delivered to the defendant's tenants, as directed to do by the defendant. The defendant denied that he bought any fertilizer of plaintiff, or that he ever agreed to pay for fertilizers to be delivered to his tenants. The plaintiff testified that he sold the fertilizers to the defendant to be delivered to his tenants (the Bentons) at the price of 325 pounds lint cotton per ton. The defendant introduced the Bentons as witnesses, both of whom testified that they bought the fertilizer of the plaintiff on their own account at the price of $20.50 per ton and that the defendant Yelverton had nothing to do with it. The plaintiff was then allowed, under objection of defendant, to prove by Junius Slocumb, the book-keeper of Weil the party from whom plaintiff bought the guano, that he was to pay $20.25 per ton, upon the same time the Bentons testified they were to have it—the plaintiff having testified that it cost him 25 cents per ton to deliver the fertilizer.

The court in charging the jury, among other things, said: "In coming to a conclusion, you may consider the reasonableness of the evidence of any or all the witnesses. For instance, you may consider whether it is reasonable to believe that the plaintiff sold the guano at what it cost him, on the same time."

In the admission of this evidence there was error and, emphasized as it was in the charge of the court, it is most likely that it prejudiced the defendant's case. To make evidence competent and admissible "it must tend to prove the issue in dispute," 1 Greenleaf Ev., Sec. 51. "Collateral facts, that is, facts collateral to the fact to be proved, are inadmissible," *Greenleaf, supra*, Sec. 52. The issue in this case was not the value of the guano, but whether there was a contract of sale.

The evidence of Slocumb is no part of the *res gestae*. It is not an admission of defendant. It is not in corroboration of the testimony of any witness. It does not show motive. It affords an argument, but not a reason to sustain the plaintiff's contention. It is collateral to the issue and "too remote to be allowed in evidence." 1 Best on Evidence, Sec. 251 and 252.

There are exceptions to the charge of the court, but as the error pointed out entitles the defendant to a new trial, and as these exceptions will not likely arise on a new trial, we have not considered them.

Error.

CLARK, J., dissenting: The issue submitted was "what amount if any, is defendant indebted to the plaintiff?" There was conflict of evidence as to the liability and, if any, the testimony conflicted further as to the price.

There being a conflict in the evidence as to what was the price agreed upon by the parties, the fact that the price asserted by the vendee was not above the cost of the article to the vendors was *some* evidence to be submitted to the jury. As the vendors were conducting their business for profit, this was some evidence tending to corroborate their testimony that they agreed upon a higher price. "It is not necessary that the evidence should bear *directly* on the issue. It is admissable if it *tends* to prove the issue or constitutes a link in the chain of proof, although alone, it might not justify a verdict in accordance with it." *Greenleaf Ev.*, Sec. 51a. *Taylor Ev.*, (Sec. 316) after quoting this rule in the same words says: "While the Judge should reject as too remote every fact which furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble light, on the question in issue." "In doubtful cases, and in the absence of better evidence, the actual cost of the thing to the seller is relevant to the question of its value," Abb. Trial Ev., 307. "In such cases, evidence of the price paid by vendors is competent. The authorities on this subject are decisive and uniform, and we think the rule they establish is sound in principle." *Wells* v. *Kelsey*, 37 N. Y., 143, citing several cases. "It has been held that what a party paid for property is some evidence of its value." *Hoffman* v. *Connor*, 76 N. Y., 121, citing several authorities. The value of the articles, and still more the cost of the same, was competent, not to contradict an agreement as to price if it had been shown, but to aid the jury in coming to a conclusion upon the conflicting evidence as to what was the price agreed on. "The direct evidence being evenly balanced, the jury could consider and weigh the probabilities, and the evidence thereof is competent." *Nelson* v. *Davis*, 6 Am. Rep. 568; *Harris* v. *Railroad*, 58 N. Y., 660; Abb. Trial Ev., 305, 309. In my opinion it was very pertinent and useful to the jury, as it would have been to any one outside a jury box in coming to a conclusion as to which of the two parties, if of equal character, was right as to the agreement, and His Honor properly admitted it for that purpose, as he told the jury.

J. J. ROBINSON, Administrator of Needham Kennedy, v MARTHA A. SAMPSON, et. al.

Evidence, Relevancy of—Issues—Objection to Issues when made.

1. While the entry of satisfaction of a mortgage on the margin of the registry, witnessed by the Register of Deeds, is competent evidence of the payment of the debt secured thereby, yet, on an issue "What amount, if any, has been paid on the debt due to M. S.," by plaintiff's intestate, entry of satisfaction of intestate's mortgage to a third person, introduced for the purpose of showing that the alleged debt of M. S. arose from the officious payment by her of such mortgage and was, therefore, not a debt of the estate, was irrelevant and incompetent.
2. A defect in the form of an issue cannot be assigned as error on appeal when not excepted to below.

SPECIAL PROCEEDING commenced before the Clerk of the Superior Court of WAYNE County, and tried before *Robinson, J.*, and a jury at Fall Term of said Court, upon an issue of fact raised by the pleadings. The petition alleged that the estate was indebted in about the sum of $200.

The second and third paragraphs of the answer were as follows:

"2. That they are informed and believe that the whole of the indebtedness of the estate of Needham Kennedy, except the charges of administration, consists of $150, alleged to be due Martha Ann Sampson, widow of Needham Kennedy; that said indebtedness to Martha A. Sampson has been partially paid and discharged, according to their best recollection and belief, and they respectfully demand that the following issue be submitted to a jury, to-wit:

"What amount, if any, is the estate of Needham Kennedy indebted to Martha Ann Sampson?

"3. That they have no information, sufficient to form a belief, of the amount of the charges of the administration, and therefore deny the same."

The following was the issue certified to the Superior Court in term for trial, and agreed to by both parties, and upon which it was tried:

"What amount, if anything, has been paid on the debt of one hundred and fifty dollars due Martha Ann Sampson?"

It was admitted that said debt of $150 consisted in part of a mortgage given by Needham Kennedy and wife to W. C. Monroe, and another, which the said Martha Ann Sampson alleged she had paid off with her own money.

The defendants offered in evidence said mortgage, and the entry "Satisfied" on the margin of the record, which entry was signed by the mortgagee and witnessed by the Register of Deeds.

(Objected to by plaintiff. Objection sustained, and defendants—other than Martha Ann Sampson—excepted.)

No other evidence was offered. The jury, under the instruction of the Court, answered the issue, "Nothing"; to which defendants, (except Martha Ann Sampson) excepted, and appealed from the judgment rendered thereon,

Messrs. Allen & Dortch, for plaintiff.

Mr. S. W. Isler, for defendants (appellants).

CLARK, J.: It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of "satisfied" on the margin of the record signed by the mortgagee and witnessed by the Register of Deeds. *The Code*, Sec. 1271. *Prima facie*, satisfaction of the mortgage is that of the debt secured thereby, subject to evidence of an agreement to the contrary. *Burke* v. *Snell*, 42 Arkansas, 57; *Chappell* v. *Allen*, 43 Missouri, 213; *Fleming* v. *Parry*, 24 Pa. St., 47. But the plaintiff contends that on an issue, "What amount, if any, has been paid on the debt of $150 due Martha Ann Sampson?", it is irrelevant to show that she created part of that debt by paying off a mortgage due plaintiff's intestate. On the form of the issue, this is apparent. We infer that the object of the defendant was to deny part of the indebtedness by showing that it was a mere voluntary and officious payment by Martha Ann Sampson of a mortgage indebtedness of her husband, the plaintiff's intestate, and therefore not an indebtedness of the estate, *Meadows* v. *Smith*, 34 N. C., 18, and the appellant's brief points out that in the answer filed before the clerk the issue asked for was, "What amount, if any, is the estate of Kennedy indebted to Martha Ann Sampson"—an issue which would have made the rejected evidence relevant. But the issue in its present form was settled by the clerk and certified up to the Superior Court at term, without objection, and His Honor was not asked to correct or amend it, as he might have done. *Faison* v. *Williams*, at this term. It is true that the issues arise upon the pleadings, but a defect in the issue cannot be assigned here when not excepted to below. *Wills* v. *Fisher*, 112 N. C., 529; *Moore* v. *Hill*, 85 N. C., 218; *Alexander* v. *Robinson*, Ibid., 275, and cases cited in Clark's Code, Sections 392, 395.

No error.

MONROE BROTHERS & CO., v. FUCHTLER & KERN et al.

Sale of Land Under Trust Deed—Setting Aside Sale For Creditors.

1. A *cestui que trust* may buy at the trust sale for his benefit.
2. The fact that the trustee in a trust deed was a clerk for the *cestui que trust* does not create a fiduciary relation between the grantors and the latter.
3. A sale of land made by a trustee fairly and according to the provisions of the deed will not be set aside for mere inadequacy of price, un-

less such inadequacy is so great as to cause all acquainted with the value of the land to say at once, "The purchaser got the land for nothing!"

CIVIL ACTION to set aside trustee's deed to real estate, heard before *Adams, J.*, at April Term, 1897, of WAYNE Superior Court. The Court gave judgment for the defendants, and the plaintiffs appealed. The facts appear in the opinion.

Mr. W. C. Monroe, for plaintiffs (appellants).
Messrs. Allen & Dortch, for defendants.

FURCHES, J.: In 1890 the defendants, Fuchtler & Kern, and their wives conveyed the land in controversy to Julius Slocumb in trust to secure the payment of a debt to H. Weil & Bros., and a debt to Sol. Weil, amounting in all to about $1,000. This trust deed contained the usual powers of sale and was filed for registration and registered in 1890, though it was not indexed in the individual names of the grantors or grantee, and there was no alphabetical index of the same ever made. In 1893 the plaintiff recovered a judgment against the makers of said deed in trust for $421.91, which was docketed in Wayne County. After this judgment was docketed in Wayne County, where the land lies, the trustees sold under the power contained in said deed, and S. Weil, one of the *cestuis que* trust in the deed, became the purchaser at the price of $1,000, and said land was alleged to be worth $2,000.

The trustee named in the deed was a clerk of H. Weil & Bros., but said sale was conducted in accordance with the powers and provisions contained in the deed, and was fair and honest.

No money was actually paid at the sale, as the property did not bring enough to pay the debts secured. And the parties to whom the money was going credited the amount of the bid on their debts, and the trustee made the purchaser a deed for the property so sold. *Easton* v. *Bank*, 127 U. S., 532.

This action is brought by the judgment creditor to set aside the deed from the trustee to S. Weil, and to have a resale of the property, the trust debts to be first paid out of the proceeds and the residue, or a sufficient amount thereof, applied to the payment of plaintiff's debt.

The parties agreed upon the facts in this case, which we have in substance stated above. Upon the facts agreed the Court gave judgment for defendants and the plaintiff appealed, and claims that he was entitled to judgment upon two grounds:

First, That as the trustee, Slocumb, was a clerk for the firm of H. Weil & Bros., this constituted a fiduciary relation between the makers of the deed and S. Weil, a member of the firm of H. Weil & Bros., and the purchaser at the trust sale.

Second, That the price paid, $1,000, for property worth $2,000, was so grossly inadequate as to shock the moral sense of honest men, and cause them to exclaim "That he got the property for nothing."

The plaintiff, in discussing the first ground, (fiduciary relations), treated the deed of trust as a mortgage, and the sale by the trustee as a sale by a mortgagee, where he bought at his own sale, and cited *Gibson* v. *Barbour*, 100 N. C., 192, as authority for this position. But the case cited does not support the contention of the plaintiff. That case has reference to a sale by a trustee where the trustee became the purchaser, and would have been in point if Slocumb had become the purchaser in this case, and not S. Weil.

It is a mistake, when the plaintiff thinks that because Slocumb was a clerk in the store of H. Weil & Bros., this fact created a fiduciary relation between the makers of this deed of trust and the parties whose debts were secured therein. *Clark* v. *Trust Co.*, 100 U. S., 149. If this had been a mortgage to S. Weil, the doctrine enunciated in *Hall* v. *Lewis*, 118 N. C., 509; *Atkins* v. *Crumpler*, Ibid., 532, and again in S. C., 120 N. C., 308, would apply, and a presumption of fraud would rest on the purchaser that he would have to explain and make good. But the relations of a trustee to the parties whose debts are secured are very different from those of a mortgagee. He is the agent of both the maker of the deed and the *cestuis que* trust. He is to execute the trust, and all that is required of him is that he shall do this faithfully and honestly, *Hinton* v. *Pritchard*, 120 N. C., 1. The *cestui que* trust has a right to buy at the trust sale. *Hinton* v. *Pritchard*, *supra; Smith* v. *Black*, 115 U. S., 308; *Easton* v. *Bank*, *supra*.

It is admitted by the plaintiff in the case agreed that, "this sale was conducted in accordance with the provisions of the trust deed and was *fair and honest*." We must therefore hold that the plaintiff has failed to show that he is entitled to have the deed to Weil set aside and a re-sale ordered, upon the first ground assigned.

The second ground is that the great inadequacy of the price paid, $1,000, for a $2,000 house and lot, of itself, entitles the plaintiff to the relief demanded—admitting the honesty and good faith of the trustee, Slocumb, in making the sale. And for this position he cites *Fullenwider* v. *Roberts*, 20 N. C., 278, *Worthy* v. *Caddell*, 76 N, C., 82, and *Trust Co.*, v. *Forbes*, 120 N. C., 355.

Fullenwider v. *Roberts* was an action of ejectment under the old practice, no equity in it, but was a question of law under 27th Elizabeth. In that case, one Falls had sold his land for $500, upon such long time and for such inadequacy in price, that it was contended by the plaintiff that it was fraudulent; that the plaintiffs afterwards purchased the same land for $50 and brought suit against those in possession, under the former sale, for possession who defended upon the ground that the plaintiff was not a *bona fide* purchaser for value under 27th Elizabeth. It was shown that the land was worth $25,000, and that $50 was only one five hundredth part of its value. Upon this state of facts, the Court held that the price paid was so small, compared with the value of the land, that it amounted to no consideration, and the plaintiff was not protected by 27th Elizabeth, In delivering the opinion in that case, Judge Ruffin uses the language, quoted by the plaintiff, that "where the price given or pretended to be given, that every body who knows the estate will exclaim at once, 'why, he got the land for nothing,' the law would be false to itself if it did not say sternly and without qualification to such a person that he had not entitled himself to the grace and protection of the statute." But this language was not invoked by that great Judge in aid of any equity jurisdiction, as contended for by the plaintiff in this case. Nor are the facts of this case anything like the facts in that case.

The case of *Worthy* v. *Caddell*, 76 N. C., 82, was an application to sell land for assets by the administrator of one Morris, commenced before the Clerk in the Superior Court of Moore County, in which fraud was alleged, as provided by statute. So it was purely a legal question arising under 13th Elizabeth—the action being for the benefit of creditors. And the learned Chief Justice who delivered the opinion of the Court in that case, put the opinion of the Court upon the principles announced in *Fullenwider* v. *Roberts*. There were no principles of equity involved in that case,

The principles announced in *Trust Co.* v. *Forbes*, 120 N. C., 355, so far as they have any bearing, sustain the contention of the defendant in the case. *Smith* v. *Black*, and *Easton* v. *Bank*, *supra*. We do not say but what the facts in this case create suspicion of fraud upon our minds. But we cannot give plaintiff the relief demanded, because we may suspect that there has been something wrong—fraud—in this transaction, on the part of the defendants.

After a careful investigation of the whole matter, we find no error and the judgment is affirmed.

Affirmed.

W. H FINLAYSON, Trustee, et al. v. G. L KIRBY et al.

Practice—Appeal—Parties.

Where, in an action to recover land, the defendants pleaded as an estoppel a judgment rendered in a proceeding for the settlement of the estate of a deceased person under whom all parties claimed and the record shows that some of the heirs and distributees interested in such proceeding had died during the pendency thereof, and that their heirs had not been made parties to the case at bar; *Held*, that the case will be remanded by this Court, in order that all interested persons may be made parties and that the rights and equities of all may be disposed of in one final judgment

CIVIL ACTION to recover land, tried before *Adams, J.*, and a jury at Spring Term, 1897, of WAYNE Superior Court. There was a verdict for the defendants and from the judgment thereon the plaintiffs appealed.

Mr. H. G. Connor, for plaintiffs (appellant).

Messrs. Allen & Dortch and *W. C. Monroe*, for defendants.

FAIRCLOTH, C. J.: This is an action of ejectment and the title of the land described is in question—all parties claiming under Waitman Thompson, Sr., who conveyed the land to Finlayson and Hines in trust for his son, Waitman Thompson, Jr. The latter and his wife have died leaving no issue of their bodies. The plaintiffs allege that Thompson, Jr. had only a life estate and that they are now the owners in fee. The defendants claim under Thompson, Jr., by *mesne* conveyances and allege that he had an estate in fee simple, and that they are the owners. They also insist that the plaintiffs are estopped by force of a judgment rendered in a proceeding before the Clerk for a settlement of the estate of Thompson, Sr., in which proceeding the personalty and realty, as advancements, were considered and accounted for, including that now in question, to which proceeding all the Thompson heirs were parties. It appears from the record before us that, pending said proceeding for settlement, several of the Thompson heirs and distributees died intestate and that their heirs were never made parties to that proceeding, and they are not parties in this action. Their personal representatives only were brought into the proceeding for a settlement. In order that the rights and equities of all the parties may be disposed of in one final judgment, we have concluded to send this case back to the end that all interested persons be made parties, and that they may be finally concluded as to both the real and personal estate. We think it would not serve any useful purpose to express any opinion on the interesting questions argued here, until all interested persons have had an opportunity to be heard.

Remanded.

ANNISTON NATIONAL BANK v. SCHOOL COMMITTEE OF DURHAM.

Practice—Trial—Burden of Proof—Directing Verdict—Assignment of Open Account.

1. Where the party upon whom the burden of proof rests offers no evidence to prove the issue or none that the jury ought to find a verdict upon, the trial judge should so announce and direct a negative finding; but

in no case, however strong and uncontradictory the evidence is in support of this issue, should the Court withdraw the issue from the jury and direct an affirmative finding.

2. Any contract that constitutes an indebtedness or money liability may be assigned.

CIVIL ACTION, tried before *Timberlake, J.*, and a jury at June (Special) Term, 1897, of DURHAM Superior Court. The facts appear in the opinion and in the report of former appeal (118 N. C., 383). From a judgment for the plaintiff the defendant appealed.

Mr. J. S. Manning, for plaintiff.
Messrs. Guthrie & Guthrie, for defendant (appellant).

FURCHES, J.: This case has been here before and is reported in 118 N. C., 383. On the trial presented by this appeal, the plaintiff and defendant both tendered issues for the jury. The court accepted those tendered by the plaintiff and rejected those tendered by defendant, and the defendant excepted. We see no error in this ruling, as there is no issue arising from the pleadings that the issues adopted by the court did not present. And we can see no grounds of defence that the defendant was entitled to, that might not have been made under these issues. *Baker* v. *Railroad*, 118 N. C., 1015; *Denmark* v. *Railroad*, 107 N. C., 185. *Rittenhouse* v. *Street Railway*,120 N. C., 544.

The issues submitted were as follows:

1. Is the plaintiff a corporation?

2. Was the defendant given notice of the assignment by the Ruttan M'f'g. Co. to the plaintiff of the contract and the balance due thereon, before the rendition of the judgment in the action of *Taylor* v. *Ruttan M'f'g. Co.*?

3. Was the assignment of the said contract legally made?

4. Was the said assignment made with intent to defraud, hinder or delay the creditors of the said Ruttan M'f'g. Co.?

5. Is the defendant indebted to the plaintiff, and, if so, in what amount?

The case on appeal states that the court withdrew the case from the consideration of the jury, and directed the jury to answer the issues as set forth in the record, to-wit, "Yes" to issues 1, 2, and 3, and "No" to the 4th issue, and to the 5th issue $340.47, and the defendant excepted. This exception must be sustained.

The burden of establishing the 1st, 2nd, and 5th, issues was upon the plaintiff. This being so, it was error in the court to withdraw these issues from the jury. If the party, upon whom the burden of proof rests, has offered no evidence to prove the issue, or no such evidence as the jury ought to find a verdict upon (as in *Wittkowsky* v. *Wasson*, 71 N. C., 451), the court should say so, and direct a finding in the negative, *State* v. *Shule*, 32 N. C., 153. But no matter how strong and uncontradictory the evidence is in support of the issue the court cannot withdraw such issue from the jury and direct an affirmative finding. To do this is to violate the Act of 1796—section 413 of *The Code*. *State* v. *Shule, supra; Hardison* v. *Railroad*, 120 N. C., 492; *Spruill* v. *Ins. Co.*, Ibid, 141; *White* v. *Railroad*, at this term.

If there is no evidence to support the negative, and the evidence, if true, establishes the affirmative of the issue, the court may instruct the jury that if they believe the evidence they may find an affirmative, that is for the party upon whom the burden rests. *Wool* v. *Bond*, 118 N. C., 1; *State* v. *Shule, supra.* It seems to us from an examination of the evidence in this case, that the jury would have found these issues as the court did, if the finding had been left to them, and that would have been the end of the matter.

It was argued that this contract was not assignable as a matter of law, and as the case goes back for a new trial, this question will meet the plaintiff at the very threshold. If it is not assignable, this ends the case for the defendant. If it is assignable, the plaintiff should not be troubled again by this question. It is a contract on the part of the Ruttan M'f'g Co., to put a heater in the public school building in the town of Durham, for which the defendant agreed to pay said company $2,800. The defendant had paid the greater part of the price, when the parties came to a settlement, and it was ascertained that the defendant still owed on said contract the sum of $331.11.

Why this contract was not assignable, we are not able to see. It seems that under our statute almost any contract, that constitutes an indebtedness or money liability, may be assigned. *Redmond* v. *Staton*, 116 N. C., 140. In our opinion this contract was assignable. But such assignment, like any other transaction, may be vitiated by fraud. But if this is alleged, its proof rests on the defendant—the party that makes the allegation.

Error—new trial.

MOREHEAD BANKING COMPANY v. B. L. DUKE, et. al.

Practice—Judgment—Erroneous and Irregular Judgments—Amendment or Correction of Judgment.

1. An erroneous judgment is one entered regularly but contrary to law and can not be set aside at a subsequent term of the Court, while an irregular judgment is one entered contrary to the course and practice of the Court and may be set aside on motion if made after notice, within apt time.
2. A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects.
3. Where, in an action against the makers of a joint and several note, the complaint alleged no difference in the liability of the makers except in the prayer for judgment, and a judgment by default was entered against two of the defendants who failed to appear and answer; *Held*, that it was error, at a subsequent term and after due notice, to

amend the judgment, on motion of the defendants, by inserting after their names the words "as sureties", it not being the practice of the Courts to see that evidence of suretyship is produced and such fact inserted in the judgment in the absence of the defendants and without any averment or request on their part.

MOTION to correct a judgment heard before *Allen, J.*, at January Term, 1897, of DURHAM Superior Court. The motion was allowed and plaintiff and L. L. Morehead, Executrix, (defendant) appealed.

Messrs. Boone & Bryant, J. W. Graham and *F. A. Green*, for defendants Duke and Green.

Messrs. Winston & Fuller and *J. S. Manning*, for defendant Morehead (appellant).

FAIRCLOTH, C. J.: Facts: On March 16th, 1893, L. L. Morehead, B. L. Duke and L. Green executed their promissory note to the plaintiff. At October term, 1893, on action brought on verified complaint, a final judgment was entered against Duke and Green, no process having been made on Green, nor answer filed by Duke. By consent said judgment was canceled and case continued, and in December, 1893, personal service on Green was made. At June term, 1894, a final judgment by default was entered against Duke and Green, neither one having filed an answer, and no amendment made to the complaint. The judgment has remained, no judgment yet against L. L. Morehead, nor have any rights of third parties intervened. At January term, 1897, after due notice, a motion was made to "correct and amend" the judgment of 1894 by inserting after the names Duke and Green the words "as sureties" and it was so ordered by His Honor, who held that the judgment at June term, 1894, was irregular, and in that there was error.

There can be no relief under *The Code*, Sec. 274, as that is a remedy for a mistake of the *party* and it must be within one year. A judgment *nunc pro tunc* means to enter a judgment *now* which was intended *then* and there is no evidence that the court intended to enter a judgment other than that which was entered.

An *erroneous* judgment is one entered regularly but contrary to law, and cannot be set aside at a subsequent term of the court. The only remedy is by appeal or *certiorari*.

An *irregular* judgment is one entered contrary to the course and practice of the court, as without service of process. *Wolfe* v. *Davis*, 74 N. C., 597.

A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. *Walton* v. *Walton*, 80 N. C., 26. The court having jurisdiction of the parties and the subject, the parties are bound to take notice of what was done until final judgment therein. The law charges them at their peril to be watchful of their interests therein, and it is their neglect and their folly if they do not, so that the defendants were charged with notice of what they allege was wrong in the judgment from the day of its rendition. *Stancill* v. *Gay*, 92 N. C., 455.

Was the judgment irregular? It is the record of what was actually done and not of what might have been done. The note was the joint and several obligation of all the signers to pay money, with no indication as to who was principal or surety. The creditor was entitled to a judgment. *The Code*, Section 2100, extends to defendants, in actions upon contract, who insist that they are sureties, the privilege of having that fact found by the jury and endorsed by the clerk on the execution, &c. Is it the course and practice of the courts to see that such evidence is produced, and then upon the verdict insert that fact in the judgment in the absence of the defendants, and without any averment or request on their part to do so? Could the Court have intended to do so? We think not. So the judgment cannot be irregular, and cannot be amended by inserting what was not intended at its rendition. This conclusion dispenses with the necessity of considering whether the application was made within a reasonable time.

Reversed.

NATIONAL BANK OF VIRGINIA v. J. S. CARR.

Action on Note—Parties—Liability of Endorsers.

The owner of a note endorsed by the payees for the accommodation of the maker may sue any one of several endorsers without joining the maker or any other endorser.

CIVIL ACTION tried before *Timberlake, J.*, at June (Special) Term, 1897, of DURHAM Superior Court. The facts appear in the opinion. From a judgment for the plaintiff the defendant appealed.

Messrs. Winston & Fuller, for plaintiff.
Messrs. Guthrie & Guthrie, for defendant (appellant).

FAIRCLOTH, C. J.: C. G. Holland made his promissory note payable to J. S. Carr and John W. Holland, and said payees endorsed said note for the accommodation of C. G. Holland and in the regular course of business said note became the property of the plaintiff, who brings this action against J. S. Carr alone. The defendant insisted that the administrator of C. G. Holland, and John W. Holland, and one Green to whom C. G. Holland had conveyed some property in trust to indemnify said John W. Holland against loss by reason of said endorsement, should be made parties defendant before the plaintiff could recover against him, the present defendant. The defendant's counsel failed to cite any authority in support of his contention, and we are not aware of any.

A note signed by the principal and sureties is a joint and several obligation to pay money, and the owner may sue all or either of the obligors; and endorsers may be sued likewise. *Code,* Sections 41 and 50. We see no error in the record.

Judgment affirmed.

RICHMOND PERPETUAL BUILDING & LOAN AND TRUST COMPANY v. J. S. CARR.

Action on Note—Parties—Liability of Endorsers.

The owner of a note endorsed by the payees for the accommodation of the maker may sue any one of several endorsers without joining the maker or any other endorser.

CIVIL ACTION, tried before *Timberlake, J.*, and a jury at June (Special) Term, 1897, of DURHAM Superior Court. From a judgment for the plaintiff, defendant appealed.

Messrs. Winston & Fuller, for plaintiff.
Messrs. Guthrie & Guthrie, for defendant (appellant).

FAIRCLOTH, C, J.: This case is governed by the opinion in *Bank* v. *Carr*, at the present term.

Judgment affirmed.

MOREHEAD BANKING CO., v. I. N. WALKER, Admr., et al.

Practice—Burden of Proof—Right to Open and Conclude Argument—Evidence—Transaction with Deceased Person—Order to Produce Note.

1. A defendant in an action upon a note, who admits the execution of the instrument but alleges payment, has a right to assume the burden on the trial.
2. In the trial of an action on a note against the administrator of the deceased maker, the cashier of a plaintiff bank, the payee of the note, is a party in interest and disqualified under *Code* section 590, from testifying as to conversations with intestate of defendant
3. It is a matter of discretion of the trial Judge to allow a defendant, who has assumed the burden of proof, to open and conclude the argument.
4. Notice to an administrator, defendant in an action, is, in law, notice to his attorney; and where, in the trial of an action, the administrator in reply to a notice to produce a note alleged to have been paid, stated that his intestate had told him that he had given it to his attorney, (who was also the administrator's attorney); *Held*, that the statement of the administrator, in return to the notice, reasonably meant that the intestate had given the note to his attorney as bearing on the matter of the suit, that the latter kept it in his possession and had it at the trial, and it was error to refuse plaintiff's request for an order on the attorney to produce the note.

CIVIL ACTION tried before *Timberlake, J.*, and a jury at June (Special) Term, 1897, of Durham Superior Court. There was a verdict for the defendant and from the judgment thereon, plaintiff appealed.

Messrs. Winston & Fuller, for plaintiff (appellant).
Messrs. Guthrie & Guthrie, for defendant.

MONTGOMERY, J.: The defendants admitted the execution of the note, which recited a consideration, but averred payment, and asked to assume the burden on the trial. The Court held that this course was a proper one and the plaintiffs excepted. His Honor was right in refusing to sustain the exception. *Stronach* v. *Bledsoe*, 85 N. C., 473; *Carrington* v. *Allen*, 87 N. C., 354. The plaintiffs offered as a witness the cashier of plaintiff bank, who was also a stockholder, to prove that in an alleged conversation between himself and Sellars, the intestate of the defendant, and the principal of the note, the intestate admitted that the note had not been paid. Upon the objection of the defendants the Court refused to receive the evidence and in doing so ruled correctly. *The Code*, Section 590. Certainly, if the witness had not been a bank officer he would have been disqualified under Section 590, and there is no reason why his official position should give him any advantage over an individual, his interest in the event of the suit being as clear and certain as such officer and stockholder, as if he were a private individual.

The plaintiff excepted to the ruling of the Court in allowing the defendant, as a matter of discretion, to open and conclude the argument in the case. His Honor properly refused to sustain the exception. Rule 6 of Practice in the Superior Courts of North Carolina, 119 N. C., 959; *Shober* v. *Wheeler*, 113 N. C., 370.

The defendants, as we have said, in their answer admitted the execution of the note, but averred that the same had been paid and satisfied at the time it fell due, or very soon thereafter, by the execution of a new note for the like amount by the intestate Sellars, with J. B. Jobe as surety, due six months after date, and that the plaintiffs received the substituted note in full satisfaction and payment of the first mentioned note—the one declared on in this action. The defendants also averred that at the time of the substitution of the note with Jobe as surety, for the other, the plaintiff agreed to deliver and surrender the first mentioned note, the one sued on, to the defendants, but that the cashier in looking for it could not find it, saying it was misplaced, but that he would find it and deliver it to Sellars, the intestate of the defendant. Jobe was introduced as a witness for the defendants and testified that about *two months after* the execution of the note sued on, March 1, 1893, the note made by Sellars, the intestate, with himself as surety, was substituted for the note of Sellars with Walker as surety, the one which is the subject of this action. On his cross examination the witness said that he had also signed another note for Sellars on the 27th of August, 1892, for a like amount, and running for the same time as the one of March 1, 1893, and that he did not think that the note of August, 1892, was paid before maturity. He also said that the note of August, 1892, was taken up two months before the one sued on was given.

The plaintiff from this testimony, observing that the note of March 1, 1893, was the date of the maturity of the note of August 27, 1892, concluded that probably the note of August, 1892, would show on its face or upon its back that it was paid by renewal and with the note of March 1, 1893, and the *plaintiff*, at once served a notice on defendant administrator to produce the note of Sellars, the intestate, with Jobe as surety, dated August 27, 1892. The defendant administrator immediately answered the notice, saying that he did not have the note and had never seen it; that Sellars, his intestate, had told him that he had given it to his attorney, who was then engaged in the trial for the present defendant. The plaintiff then asked the Court to require the attorney to produce it. This motion was refused by the Court on the ground, First, that there was no evidence that the attorney had the note at the time of the trial, and second, that no notice had been given him to produce it. There was error in this ruling of his Honor. The notice to the administrator was, in law, notice to his attorney. 1 Greenleaf on Evidence, par. 560 and note; *Baldney* v. *Ritchie*, 1 Starkie, 338.

There was no point made that the order to produce the note was requested on a notice too short, for the administrator answered it at once, and it was conceded here by the defendant's attorney that the notice to his client was notice to him, if it was good as to his client. The refusal then, of his Honor, rests upon his finding that there was no evidence that the attorney had the note at the time of the trial. Sellars, the intestate of the defendant, was living when this suit was commenced, and Walker's statement, in his return to the notice, reasonably meant that the intestate had given to his attorney in the action, who is the same employed in the defence at the trial, this note as bearing on the matter of the suit. The inference is strong, therefore, that the attorney kept the note in his possession and that he had it at the trial. If he had it, the plaintiff was entitled, under section 578 of *The Code*, to have it produced. The order should have been made and the note produced, or the failure to produce it satisfactorily accounted for. Of course, upon the return to the notice, the attorney could have shown that he never had had the note, and then the rule would have been discharged.

Error—new trial.

W. N. LADD v. MARY J. LADD.

Action for Divorce—Petition for Divorce for Abandonment—Pleading—Amendment—Practice.

1. In an action for divorce, in which the defects in the complaint are not cured by the verdict, it is not sufficient to allege, (following the words of Chapter 277, Acts of 1895) merely the abandonment by the wife, and her living separate and apart from her husband, and her still refusing to live with him, but all the facts relied on as constituting the cause of action are required to be set forth specifically and definitely.

2. Where an exception is made, for the first time in this Court, that the complaint does not state facts sufficient to constitute a cause of action, and the defects are such that they cannot be cured by additional averments, the action will be dismissed; but if the defects, though too serious to be cured by a failure to demur, can possibly be cured by additional averments, this Court will not dismiss the action, but will grant a new trial, in order that the plaintiff may ask leave to amend.

3 An act permitting divorces for past abandonment but not to apply to future cases of separation is constitutional

CIVIL ACTION for divorce, tried before *Allen, J.*, and a jury at March Term, 1897, of DURHAM Superior Court.

The complaint was as follows:

"The plaintiff alleges:

1. That on the 11th day of August, 1892, he and the defendant, Mary J. Ladd, were duly married.

2. That more than two years ago, *to-wit:* about the first day of January, 1894, the defendant, Mary J. Ladd, his lawful wife, as aforesaid, abandoned the plaintiff, and since that time has lived separate and apart from him, refusing at all times since to live with him, and still so refusing.

3. That plaintiff has been a resident of the State of North Carolina for more than three years next before the filing of this complaint.

Wherefore plaintiff prays an order and decree of the Court that this relation between himself and the defendant be dissolved, and that he may be divorced from the bands of matrimony existing between him and the defendant."

The defendant denied the abandonment on her part, and alleged that plaintiff had abandoned her and refused to contribute to the support of herself and child and that she had been a faithful and dutiful wife. Her answer also contained the following defence: "That she is advised by her counsel, and therefore alleges, that the Act under which this suit was brought, *to-wit:* Chapter 277, of the Laws of 1895, is class legislation and is opposed to the spirit of our laws and therefore of no validity. That said Act is not in harmony with that provision of our fundamental law that special provision shall be extended to no man or set of men, in that if man and wife separated March 12, 1895, and the husband abandoned the wife at that date, she might sue for and obtain a divorce in April of 1897. Whereas, had such abandonment occurred on the 14th of March, 1895, no divorce could have been granted."

There was a verdict for the defendant, and, his Honor having sustained a demurrer to the plaintiff's evidence, the plaintiff appealed.

In this Court the defendant moved to dismiss the action for the reason that the complaint did not state a cause of action.

Messrs. Boone & Bryant, for plaintiff.

Messrs. Winston & Fuller, for defendant (appellant).

CLARK, J.: There was sufficient evidence to submit the case to the jury (*State* v. *Green*, 117 N. C., 696; *State* v. *Kiger*, 115 N. C., 751), and for the error in sustaining the demurrer to evidence the plaintiff is entitled to a new trial. The defendant, however, moves in this Court to dismiss because the complaint does not state facts sufficient to constitute a cause. This is one of the two exceptions which can be taken in this Court, though not made below; the other being that the Court had no jurisdiction. Rule 27. *Kidd* v. *Venable*, 111 N. C., 535.

It is often difficult to distinguish between a defective statement of a good cause of action which is cured by a failure to demur and the statement of a defective cause of action which is not, and to which an exception can be taken for the first time in this Court. *Knowles* v. *Railroad*, 102 N. C., 59; *Mizzell* v. *Ruffin*, 118 N. C., 69. But under the settled authorities, in an action for divorce it is not sufficient to allege, following the words of chapter 277, Laws of 1895, merely the abandonment by the wife, and her living separate and apart from her husband, and her still refusing to live with him, but "all the facts relied on as constituting the cause of action are required to be set forth," and "they are to be charged, as far as possible, specifically and definitely." *McQueen* v. *McQueen*, 82 N. C., 471, citing *Whittington* v. *Whittington*, 19 N. C., 64; *Wood* v. *Wood*, 27 N. C., 674; *Foy* v. *Foy*, 35 N. C., 90. "The complaint should contain a fair representation of any transaction relied on as the ground of the decree, since its defects are not aided by the verdict." *White* v. *White*, 84 N. C., 340, citing McQueen's case, *supra;* and both these cases have been cited and approved since. *Jackson* v. *Jackson*, 105 N. C., 433; *O'Connor* v. *O'Connor*, 109 N. C., 139. Among many prior cases of the same purport are *Harrison* v. *Harrison*, 29 N. C., 484; *Everton* v. *Everton*, 50 N. C., 202; *Erwin* v. *Erwin*, 57 N. C., 82; *Joyner* v. *Joyner*, 59 N. C., 322.

If there was no jurisdiction in the Court in which an action originated, it will be dismissed in this Court on motion *ore tenus*, or even *ex mero motu* by the Court itself. But when the defect is that the complaint does not state a cause of action, if the defect is such that it cannot possibly be cured by additional averments, the action must, of course, be dismissed; but when the defects, though too serious to be cured by a failure to demur, yet are not so radical that they cannot be cured by permitting additional averments,—the line between which, as above stated, is difficult to draw,—the Court will not dismiss, but will grant a new trial, that the plaintiff may ask leave to amend. This was the course pursued by this Court in both *Jackson* v. *Jackson*, and *O'Connor* v. *O'Connor*, *supra*. While this distinction has not always been noted, and cases in which the defect, though too serious to be cured by pleading over, was yet capable of being stated on a repleader, have been dismissed, the latter course was an oversight and should not be followed in that class of cases.

As both parties are thus entitled to a new trial, each will pay his own costs in this Court. *Code*, Section 527.

The defence set up in the answer that the act of 1895 is invalid and unconstitutional is without merit. New trial.

O. F. BRESEE v R. W. CRUMPTON.

Action on Note—Assignment of Note without Endorsement—Authority of Agent of Payee to Endorse Note—Unendorsed Negotiable Paper—Equitable Owner of Note—Defenses.

1. When no general authority to a clerk from his principal to endorse notes payable to the latter is shown, nor course of dealing from which such authority could be inferred, the fact that the clerk had endorsed other notes previously, with the sanction and approval of the payee, was no evidence sufficient to go to the jury in the trial of an action on a note that the clerk had authority to endorse the note to another.
2. The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and as such has, *prima facie*, the equitable title and can maintain an action thereon under Section 177 of *The Code.*
3. The transferee of an unendorsed negotiable note (unless payable to bearer) takes the paper subject to all equities which the maker has against the payee.
4. In an action by the transferee of an unendorsed negotiable note against the maker, the latter may show, in evidence, the conditions upon which it was executed and delivered to the payee in order to show a failure of consideration, such evidence not being a contradiction of the terms of the written contract but proof of an additional verbal agreement.
5. Where a note was given to a local agent of an insurance company for the initial premium on a policy, to be cancelled and returned to the maker upon certain contingencies (which happened) and the note was immediately assigned without endorsement to a general agent of the Company; *Held,* that inasmuch as the Company would have held the note subject to the agreement between the maker and the local agent, the transferee (the general agent) who was fixed with notice that the note was a premium note, the property of the Company, was not a holder without notice of what would have affected the note in the hands of the Company.

CIVIL ACTION tried before *Allen, J.*, and a jury at Spring Term, 1897, of PERSON Superior Court, on defendant's appeal from the judgment of a Justice of the Peace. There was a verdict for the defendant and from the judgment thereon plaintiff appealed.

Messrs. W. W. Kitchin and *A. L. Brooks*, for plaintiff (appellant).

Messrs. Boone & Bryant, for defendant.

CLARK, J.: The note was endorsed to the plaintiff by the plaintiff's clerk signing the payee's name, and there was no evidence that such clerk had authority from the payee to make this endorsement. The bare fact that he had endorsed Parker's name to other papers with his approval, taken alone, was not evidence to submit to the jury of authority to endorse this paper, for there was no general authority shown nor course of dealing from which it could be inferred. The plaintiff is therefore simply the holder of an unendorsed negotiable paper. As such, he has *prima facie*, the equitable title and can maintain an action thereon under *The Code*, Sec. 177. *Carpenter* v. *Tucker*, 98 N. C., 316; *Kiff* v. *Weaver*, 94 N. C., 274; *Jackson* v. *Love*, 82 N. C., 405. But such transfer without endorsement (except in cases where the note is made payable to bearer) does not pass the legal title, *Jenkins* v. *Wilkinson*, 113 N. C., 532, and the transferee by not requiring the payee to endorse, is on notice and "is not a *bona fide* holder for value who takes the paper free from equities". 4 Am. & Eng. Enc. (2nd. Ed.), 250; *Allum* v. *Perry*, 68 Maine, 232. "He therefore takes the paper subject to all equities that might be set up against the transferrer." Tiedeman Com. Paper, Sec. 247, and numerous cases cited in note 4. This distinction is fully discussed and pointed out in *Miller* v. *Tharel*, 75 N. C., 148, in which it is said: "The note sued on was not endorsed to the plaintiff but was assigned to him by an oral contract. It is true that under this assignment by virtue of our recent legislation (now *Code*, Sec. 177) the assignee may sue in our

Courts in his own name, as an equitable assignee or *cestui que* trust could formerly have done in equity; but he does not acquire by such an assignment the peculiar rights which by the law merchant, founded on the policy of promoting the circulation of promissory notes, attaches to an *endorsee* of such paper. All the authorities cited to sustain the proposition that a holder of a promissory note, taken under the circumstances stated (*i. e.* before maturity, for value and without notice), can recover against the maker notwithstanding any equitable or other defence he may have, apply only to a holder by an assignment recognized by the law merchant, *i. e.* an endorsee. The distinction between a title by assignment and by endorsement is stated in 2 Parsons on Bills, 52." See also Daniel Negotiable Instruments, Sec. 729. The opinion further cites in its support *Thigpen* v. *Horne*, 36 N. C., 20; *Lindsay* v. *Wilson*, 22 N. C., 85; *Whistler* v. *Foster*, 108 E. C. L., 248; *Haskill* v. *Mitchell*, 53 Maine, 468. *Miller* v. *Tharel* is quoted with the approval of this proposition. *Bank* v. *Michael*, 96 N. C., 53.

The plaintiff, therefore, being a mere assignee and not an endorsee, and not entitled to the protection of the law merchant as a *bona fide* holder of negotiable paper before maturity, stands in the shoes of Parker, the payee, and subject to whatever equities existed between him and the maker. The conditions upon which the note was given could be shown as between them. *Davidson* v. *Powell*, 114 N. C., 575; *Bank* v. *Pegram*, 118 N. C., 671. Parker was the local agent of the insurance company. As such, he solicited the defendant and procured him to insure in said company. By his insistence the defendant was persuaded to accept provisionally a policy of $2,000, and gave his note for the premium thereon upon an agreement that if the defendant, after seeing his wife, should prefer only a $1,000 policy, the first policy and premium note were to be cancelled, and the new policy (and premium note) for the smaller amount was to be given. To show this was not contradicting the terms of the contract, but proving an additional verbal agreement. *Nissen* v. *Mining Co.*, 104 N. C., 309. In *Carrington* v. *Waff*, 112 N. C., 115, a cotemporaneous parol agreement was admitted that the note was given for commissions to be earned, and if not earned the note was to be returned—a state of facts somewhat similar to this, showing failure of consideration. His Honor instructed the jury that the evidence of the additional verbal agreement must be clear and satisfactory. The next day after the above agreement the defendant returned and informed Parker that he had seen his wife and would only take out the $1,000 policy. Parker admitted the agreement, but said that he had sent the note off to Bresee. Upon these facts, Parker could not recover, nor can Bresee (he not being an endorsee) be in any better condition.

There are other reasons why Bresee cannot recover. The note given by the defendant was a premium note for a policy of the insurance company and was its property. Parker was the local agent under Bresee who was the general agent of the company. Had the note been sent on to the company, it would have held it subject to the agreement made by its local agent. *Follette* v. *Insurance Co.*, 107 N. C., 240. The note being sent to Bresee, the general agent, he could be in no better condition and took it subject to the same equity. Of course, if the company had endorsed it before maturity to a third party for value and without notice, he would have held it discharged of the equity. The writing on the face of the note, "No. of Note 2821—No. of Policy 654, 971", did not destroy the negotiability of the note. Daniel, *supra*, Sec. 51a; Randolph on Com. Paper, Sec. 203; *Taylor* v. *Curry*, 109 Mass., 36. But it fixed Bresee, dealing with his sub-agent, with notice that it was a premium note, and hence the company's property, and he was not a holder without notice of what would have affected the note in the hands of his principal.

The plaintiff's witness further showed that the note, on its face for a premium due the company, was applied on an account due the plaintiff individually by the sub-agent. Upon the authorities the plaintiff was in law neither a *bona fide* holder (as he took without endorsement) nor without notice, nor for value. It is unnecessary to consider the exceptions in detail. There was no conflict of evidence and the above presents the controverted propositions of law.

No error.

IREDELL MEARES, et al., Receivers of the Carolina Inter State Building and Loan Association v. SAMUEL J. DAVIS, et al.

Building and Loan Association—Insolvent Corporation—Borrowing Stockholder—Distribution of Proceeds of Sale of Stockholder's Mortgaged Property.

A stockholder of an insolvent Building and Loan Association, who was also a borrower of its money on mortgage, is not entitled to have the excess of the proceeds of the sale of his mortgaged property, over the mortgage debt, paid to him, when his *pro rata* share of the deficiency in the assets of the concern is equal to such excess.

In an action for the foreclosure of a mortgage pending in NEW HANOVER Superior Court, the defendants filed the following petition in the cause:

"The defendants in the above entitled action show to the Court:

First.—That at the January term, 1897, of this Court upon the complaint herein filed, a decree by consent was rendered against the defendants, adjudging the defendants Samuel J. Davis, A. H. Zoeller and V. E. Zoeller to be indebted to the plaintiff Receivers in the sum of Four Thousand, Three Hundred and Forty-Five and 86-100 dollars, with interest thereon from July 26th, 1895, such sum being alleged and ascertained as set forth in the complaint; and also adjudging that the property described in the complaint be foreclosed.

In said decree it was set forth that:

"Counsel for all parties agree, that nothing in this decree shall preclude the defendants from contending before the Court before final decree is signed, for a further credit of 30 per cent. of the amount paid to the Carolina Inter-State Building & Loan Association, and if such contention shall be found in their favor, that the amount of the judgment herein rendered for the debt due shall be amended accordingly, and if found against them then said judgment as herein rendered shall stand."

Second—That sufficient of the property described in the complaint was sold under foreclosure by the Commissioner herein appointed and the said sum so adjudged to be due the plaintiffs was paid with the costs in this action out of the proceeds of said sale.

Third.—That according to the statement of account attached to the complaint, the defendants were due on their mortgage to the plaintiff Receivers, on July 5th, 1894, the sum Five Thousand, Three Hundred and Sixteen and 66-100 dollars, which is admitted to be true; that there were due by the plaintiff Association on the stock of these defendants, as shown by said statement, after allowing all credits, with average interest, the sum of Twelve Hundred and Seventy-four and 58-100 dollars, which is admitted to be true, being the nominal value of such stock, at the time of insolvency, as set forth in the complaint; that, of this nominal value of stock, the defendants were credited by the plaintiff Receivers with only the sum of $892.21, being 70 per cent. of the nominal value of said stock, under the plan heretofore directed by the Court in the general suit wherein the Receivers were appointed.

Fourth.—That the Receivers did not credit to these defendants the remaining 30 per cent. of the nominal value of said stock, to-wit: the sum of $382.37, because, as they alleged in the complaint, the said sum represents the *pro rata* share of the loss sustained by the Association, for which these defendants as claimed by said Receivers are liable.

Fifth.—The defendants do not dispute the amount of $382.37 to be correct, if in the settlement of their mortgage debt they are chargeable at all with any *pro rata* of the losses sustained by the Association, but defendants allege that they are entitled in the settlement of their mortgage to the credit of the said amount and are not liable to be charged for any *pro rata* of the general losses sustained in the settlement of the debt secured by the said mortgage.

Sixth.—Defendants admit that the account attached to the said Complaint is correctly stated, according to the mode of settlement prescribed under the Order of his Honor Judge Coble, but they deny that the plan of settlement prescribed by the Court and demanded by the Receivers is in harmony with the decisions of the Supreme Court of this State.

WHEREFORE, the defendants ask that the Receivers be directed to pay over to them the said sum of $382.37, charged by them against these defendants, and paid to said Receivers out of the proceeds of the sale of said property."

At September Term, 1897, of NEW HANOVER Superior Court, his Honor, *Allen, J.*, refused the petition and defendants appealed.

Messrs. Ricaud & Bryan and *E. S. Martin*, for plaintiffs.
Mr. J. D. Bellamy, for defendant (appellant).

FURCHES, J.: This is a petition in the cause filed by the defendant corporator of the insolvent "Carolina Inter-State

Building & Loan Association." It asks the Judge to make an order requiring the receivers to pay the petitioners $382.27 now in the hands of the receivers, arising from a sale of the defendant petitioner's property. It is admitted that $382.27 is their *pro rata* proportion of the deficiency of this defaulting Association.

To grant the order asked for would be to relieve the petitioners from the burdens of the defalcations of their insolvent Association, at the expense of their associate corporators.

We cannot discuss this proposition. It has so recently been discussed and decided by this Court that we will only refer to these cases—*Strauss* v. *B. & L. Asso.*, 117 N. C., 308; S. C., 118 N. C., 556; *Thompson* v. *B. & L. Asso.*, 120 N. C., 420. These cases seem to settle the question raised by the petition—especially the last case cited where the very question is discussed.

The Court properly refused to make the order prayed for, and the ruling of the Court below is

Affirmed.

STEPHEN SHERMAN v. J. F. SIMPSON.

Action to Enforce Specific Performance of Contract for Sale of Land—Description in Contract—Vague and Indefinite Description—Parol Testimony.

A description of land contained in a contract for its sale was "A certain tract or parcel of land lying between P's. land and C's. Creek and the old mill land." *Held,* that such description was not too vague and indefinite to be explained by parol testimony fitting the description to the land.

CIVIL ACTION to enforce specific performance of a contract for the sale of land by defendant to plaintiff, tried before *Coble, J.*, and a jury at September Term, 1896, of SAMPSON Superior Court. There was judgment for the plaintiff and defendant appealed.

Mr. F. R. Cooper, for defendant (appellant).

No counsel *contra*.

FAIRCLOTH, C. J.: The only question is the sufficiency of the description of the land in the written agreement. This exception is by appeal from the judgment which contains the description as follows: "A certain tract or parcel of land lying between R. P. Paddison's land and Colvin's Creek and the old mill-race." In the contrariety of decisions on this subject it is manifest that this Court has endeavored to carry into effect the intention of the parties according to the right and justice of each case, when it can be done without violating any well settled principle of law.

When the descriptive words in a deed or other writing are of doubtful import, parol proof is heard, not to add to or enlarge their scope, but to fit the description to the thing described, and this is allowed on the principle of "*Id certum est quod certum reddi potest.*" When the words found in the deed are too vague to be thus explained, the deed or instrument is void in that respect. In *Perry* v. *Scott*, 109 N. C., 374, the descriptive words were: "On the South side of Trent river, adjoining the lands of Colgrove, McDaniel and others, containing 360 acres more or less," and it was held that parol proof might be heard to aid in fitting these words to the object described in the deed.

In *Wilkins* v. *Jones*, 119 N. C., 95, the words were: "Thirty acres of land situated in Stony Creek township, adjoining the lands of the late James Woodruff, James Carter Jones and Richard Barnes," and his Honor held that the descriptive words were too vague and indefinite to be explained by parol testimony; *Held*, to be error and a new trial was ordered. These cases are direct authority for the case before us and the judgment is affirmed.

Affirmed.

R. W. HICKS v. E. A. WESTBROOK, Administratrix of J. H. Westbrook, deceased.

Practice—Appeal—Case on Appeal—Service—Striking from Files—Dismissal of Appeal—Affirmance of Judgment Below.

1. Where, in the Court below, a dispute arose as to whether there had been service of a case on appeal, it was proper for the Judge to find the facts and, having found that there had not been such service within the statutory time, it was proper for him to order the appellant's "case on appeal" to be stricken from the files.
2. A statement of case on appeal signed only by the appellant's counsel with nothing to show that it was served within the prescribed time, or at all, upon the appellee or his counsel, is a nullity.
3. The absence of a case on appeal does not entitle the appellee to have appeal dismissed, but, if no error appears on face of the record proper, the judgment below will be affirmed.

MOTION to strike from the files of the Court below defendant's statement of case on appeal heard before *Allen, J.*, at Fall Term, 1897, of DUPLIN Superior Court. The cause had been tried before *McIver, J.*, and a jury at Spring Term of said Court and defendant had appealed from the judgment then rendered.

His Honor, Judge Allen, made the following order:

"This cause coming on to be heard and it appearing to the satisfaction of the Court that the Spring Term of this Court, the term at which above entitled case was tried, adjourned on the 4th day of March, 1897, and that the defendants did not serve their case on appeal on Plaintiff or his counsel until the 5th day of April, 1897, and that more than 30 days elapsed after adjournment of said Court before said statement of case on appeal was served, on motion of counsel for plaintiff it is ordered and adjudged that the said statement of case on appeal by defendant, which was filed with the Clerk of this Court by defendant and copy of same included in Transcript for Supreme Court, be stricken from the file of papers in this cause, and from the transcript for Supreme Court for the reason that the same is not a part of the records in said action."

Defendant excepted to this order and appealed. In this Court plaintiff moved to dismiss for the absence of case on appeal.

Messrs. Frank McNeill and *J. D. Bellamy*, for plaintiff.
Mr. F. R. Cooper, for defendant (appellant).

CLARK, J.: If there was any dispute of fact as to whether there was service in time, it was proper that it should be submitted to the Court below (*Cummings* v. *Hoffman*, 113 N. C., 267; *Walker* v. *Scott*, 102 N. C., 487) and his Honor having found as a fact that there was no service of the appellant's case in the statutory time, he properly directed the appellant's "case on appeal" be stricken from the file.

This order being excepted to, the clerk sent up "appellant's case." "There being a statement of case on appeal signed only by the appellant's counsel, but nothing to show that it was served within the time, or indeed at all, upon the appellee or his counsel" it is a nullity. *Peebles* v. *Braswell*, 107 N. C., 68; *M'f'g. Co.* v. *Simmons*, 97 N. C., 89; *Howell* v. *Jones*, 109 N. C., 102. The absence of a case on appeal does not entitle the appellee to have the appeal dismissed, but there being no error on the face of the record proper, the judgment below is affirmed. *McNeill* v. *Railroad*, 117 N. C., 642; *Smith* v. *Smith*, 119 N. C., 314, and cases cited under sub-head "No case on appeal" Clark's Code p. 582, and Supplement to same p. 89. The reason of this is that, though there is no "case on appeal" which alone could show errors and exceptions on the trial, yet if upon inspection of the record proper (*Code*, Sec., 957, *Thornton* v. *Brady*, 100 N. C., 38, *Upper Appomattox Co.* v. *Buffaloe*, at this term,) the Court had no jurisdiction or a cause of action was not stated, the judgment below could not be sustained.

Affirmed.

H. WEIL & BROS., v. SAMUEL FLOWERS, et al.

Action to Redeem Land—Mortgagor and Mortgagee—Vendor and Vendee—Purchase of Land by Mortgagee from Mortgagor—Implied Promise.

Where F. bought land from B. and reconveyed, by way of mortgage, to secure his note for the purchase money, and afterwards, by bargain and sale and not by way of *rescission* of the trade with B., conveyed the land to W., who had purchased such note. *Held*, that there was no implied promise on the part of W. to repay to F. any part of the money he had paid on the note or for improvements on the land prior to the conveyance.

CIVIL ACTION, tried before *Allen, J.*, at Fall Term, 1897, of DUPLIN Superior Court. There was judgment for the plaintiffs and defendants appealed.

Messrs. Allen & Dortch, for plaintiffs.
Mr. W. C. Munroe, for defendants (appellants).

FURCHES, J.: The defendant, Flowers, bought the land in controversy from one Barfield, and executed his note and a mortgage on the land bought to secure the payment of purchase money. This trade and mortgage were made in 1888, and soon thereafter Barfield traded and assigned this note and mortgage to the plaintiffs. Thereafter, and before the 5th of March, 1895, the defendants paid the plaintiffs a part of the money due on their note as a part of the purchase money, and did ditching and clearing on the land which enhanced its value. And defendant, Flowers, says that the money so paid and the value of the ditching and clearing (which he calls improvements) amounted to more than the rental of the land, and he asks that he be paid the difference. These allegations are denied by the plaintiffs, who say they did not amount to more than the rental of the land, which the defendant has had since 1888 to 1895, inclusive. That on the 5th of March, 1895, the defendants conveyed the land to the plaintiffs in fee simple "in payment of the purchase money."

It is agreed by the parties, and made a part of the statement of the case on appeal, that the defendant does not now claim that there was fraud, nor does he want the transaction of the 5th of March, 1895, annulled and vacated, but wishes it to stand. It is also agreed and made a part of the case that there was no agreement that plaintiffs should pay defendants back any part of the money he had paid them, nor that they should pay him for what he calls improvements. But he alleges that the law implied a promise to pay the defendant what he had paid, and for the ditching and clearing, less the value of the rentals that defendant had received. And for this position he cites *Beaman* v. *Simmons*, 76 N. C., 43; *Smith* v. *Stewart*, 83 N. C., 406; *Wilkie* v. *Womble*, 90 N. C., 254, and other cases to like effect. But these cases do not sustain the defendant's contention. *Beaman* v. *Simmons* was where an incomplete sale of land was *rescinded* by mutual consent of the parties; and where there was also a promise to repay that part of the purchase money that had been paid. It is true that the Court there held that the law implied a promise to repay, without the express promise.

The case of *Smith* v. *Stewart* was a *rescission* of a contract to sell, and is governed by the same principle as that announced in *Beaman* v. *Simmons*.

Wilkie v. *Womble* was where the bargainor refused to carry out a parol contract to sell land, after receiving a part of the purchase money, and the Court held he was liable for it and the bargainee might recover it back. All this is undisputed law, but none of it fits the defendant's case. His is not the *rescission* of a contract to purchase, nor is it a parol contract to sell land, where the bargainor refuses to carry out the contract.

In this case, the defendant Flowers bought of Barfield, and afterwards *sold and conveyed* to the plaintiffs. Plaintiff's derive their title from the defendant Flowers, and hold under him. They do not hold under an original title in themselves, as they would do if they had sold to the defendant and the trade was afterwards rescinded.

Defendant cites *Hall* v. *Lewis*, 118 N. C., 509, but that case has no application to the case under consideration, as no fraud is alleged in this case and it is expressly stated that defendant wants the sale and deed of the 5th of March, 1895, from him to plaintiffs, to stand.

As we have seen that this is a *sale* and not a *rescission* of a contract, the defendant has no ground to stand on in support of his contentions. There is no error and the judgment is affirmed.

J. W. BARBEE v. R. O. SCOGGINS.

Practice—Appeal—Dismissal—Foreclosure of Mortgage for Default in Payment of Installments of Debt—Condition in Mortgage, Performance of—Release of Mortgage—Mortgage Sale of Personalty—Trial—Directing Verdict—Measure of Damages—Harmless Error.

1. Pleadings are not required to be printed as a part of the record on appeal (except when case comes up on demurrer) unless material, and, if material, this Court will not dismiss the appeal for failure to print but will simply order the additional printing.

2. A mortgage to secure a debt payable in installments can be foreclosed before the maturity of the last installment if there is a provision that, upon default in any installment, all shall become due and the powers of sale may be exercised.

3. A mortgage on realty and personalty to secure a debt payable in installments provided that, upon the payment of installments amounting to $350, the personalty should be released but that, in default in payment of one of the installments, all should become due and the mortgagee might take possession and sell. The mortgagor being in default, the mortgagee on the 6th of March, instituted an action for the possession of the personal property which was on that day seized by the sheriff and three days thereafter was delivered to the plaintiff. On the 10th of March the defendant, mortgagor, tendered to the plaintiff an amount which, added to the installments paid, equalled $350 and interest and costs of the proceeding which, being refused, was deposited with the Clerk of the Court for benefit of the plaintiff. *Held*, that, upon such payment into Court, the mortgage on the personalty was *eo instanti* released and the plaintiff should have discontinued his action.

4. A mortgagor being regarded as in the power of the mortgagee, the Courts require that the sale of personalty under a mortgage, like sales under execution, shall be made with such reasonable care as to produce the best results; hence, a sale by a mortgagee of a stock of merchandise, not in plain view but more than a hundred yards from the place of sale, and in a lump, was invalid.

5. When the burden of proof is upon a party who offers no evidence to support his contention, it is proper for the trial Judge to direct a verdict against him.

6. Where a plaintiff mortgagee lawfully seized the mortgaged personalty on the 6th of March and the mortgagor on the 10th of March tendered an amount by the payment of which it was stipulated in the mortgage that the mortgage should be released, and it was refused and the property was sold, and in the trial of the action an issue was submitted as to the damages sustained by defendant, and there was no evidence tending to show a depreciation in the market value of the goods between March the 6th and March the 10th; *Held*, that it was harmless error to charge the jury that the measure of damages was the value of the goods on the 6th of March instead of on the 10th of March.

CIVIL ACTION tried before *Timberlake, J.*, and a jury at June (Special) Term, 1897, of DURHAM Superior Court. The plaintiff on the 6th day of March, 1896, began the action to recover judgment against the defendant for an amount due under an agreement contained in a paper-writing and to recover possession of the personal property therein described. On the same day, to-wit: the 6th day of March, 1896, by an order issuing from the Clerk of the Superior Court of Durham County, the sheriff of said County seized the property described in the complaint, and in the agreement above referred to, and after retaining it for three days, in order that the defendant, if he saw fit, might replevy as allowed by law, turned over the property to the plaintiff. His Honor submitted the following issues:

1. Is the plaintiff the owner and entitled to the possession of the property described in complaint?

2. What damage, if any, is the defendant entitled to recover of the plaintiff?

3. In what sum, if any, is the defendant indebted to the plaintiff?

Plaintiff offered in evidence the following instrument in writing signed by defendant and wife:

"This indenture, made and entered into this the 19th day of July, 1895, by and between R. O. Scoggins and L. F. Scoggins, his wife, of the County of Durham, party of the first part, and J. W. Barbee, of the said County, party of the second part, bears witness:

That, whereas, the said R. O. Scoggins is justly indebted to the said J. W. Barbee for value received in goods delivered, in the sum of $730.00, bearing interest at the rate of 3 per cent. per annum until paid, to be due and paid as follows, to-wit: Ten dollars on the 27th day of July, 1895; ten dollars on the 3d day of August, 1895; ten dollars every seven days, to-wit: every Saturday thereafter until the entire debt, with interest, is discharged; and, whereas, the parties of the first part desire to secure the payment of the above indebtedness, as the same may become due, they have this day bargained, sold, aliened and conveyed, and by these presents do bargain, sell, alien and convey unto J. W. Barbee, his heirs, executors, administrators and assigns, the following property, real and personal, to wit: (Describing the lands.)

Also all the stock of goods, wares and merchandise, consisting of dry goods, boots, shoes, hats and notions, and groceries, and all other articles of sale or value, including scales, weights and measures, now placed, deposited and stored in a store house upon the lands of Mrs. L. F. Scoggins, in East Durham, &c., &c.

Also all goods, wares and merchandise of any and all kinds that may be hereafter added to the said stock of goods by way of increasing or replenishing the said stock.

To have and to hold, &c. * * *

It is expressly agreed between the parties hereto that the parties of the first part shall keep the said stock of goods, wares and merchandise up to its present value, shall keep all taxes paid, and shall pay cash for all goods added to said stock.

It is further agreed that should the parties of the first part fail for the time of ten days to meet any payment when due or after becoming due, then the whole amount of said indebtness shall immediately become due, and the said party of the second part may proceed to collect under the powers herein given.

It is further agreed that any payment that may be made upon this indebtedness by reason of the sale of certain cattle this day transferred by R. O. Scoggins to A. L. Barbee, the proceeds of which are to be applied to this indebtedness, shall not be construed to change the time nor the amount of the respective weekly installments to be due by the above agreement.

It is also agreed that, upon the payment of the sum of

$350.00 by the weekly instalments above referred to, the party of the second part will release the stock of goods and other personal property herein conveyed, from further liability as security for the above indebtedness, and such release is hereby made upon such payment."

The instrument provided for a sale in case of default in any of the agreements.

It was admitted in evidence of both plaintiff and defendant that proceeds of cattle referred to in the agreement amounted to $100.00 which was paid to the plaintiff in August, 1895. There was evidence as to the value of the stock of goods, fixing its valuation at from $400 to $1300. After the goods were delivered to the plaintiff he removed them from the store in East Durham, about one mile and a half, to a store on Main street in Durham, where the goods were kept without being ventilated, except that they were examined several times by prospective purchasers, until the day of sale. Said store was situated on the same side of the street as the court house, and is distant from 100 to 150 yards from the same. On the sale day plaintiff undertook to sell said goods at the court house door. He and the auctioneer and quite a crowd of people went into the said store, and about an hour before the said sale, and made such examination of the goods as they wished. They then left the store. The auctioneer called the crowd to the court house, where the goods were offered in a lump, not having been removed from the store building, and were cried out to one Max for $365.00, which sum, after deducting costs of sale and previous advertisement of a sale, which did not take place because of errors in the said advertisement, and also the costs of keeping the said goods, the plaintiff attempted to apply to his debt.

On the 10th day of March, 1896, the attorneys for the defendant presented to the attorneys of the plaintiff the following paper-writing, and at the same time tendered to them, as attorneys for the plaintiff, $93.12 as principal and interest money due, and $8.00 as costs in the action accrued at that time :

"SUPERIOR COURT, March Term, 1896.

To J. W. Barbee:

Please take notice that I do not owe you anything under the mortgage dated 29th March, 1895, for which you can hold my stock of goods; indeed, I expressly insist that you cannot; but I tender you in cash the sum of $93.12 principal money and interest, and $8.00 cost, and ask that you accept the same and release my goods so that I may continue my business, which you have almost, if not quite, broken up to my great injury.

R. O. SCOGGINS,
By his Attorneys."

This 7th day of March, 1896.

These amounts were declined by counsel for plaintiff, who stated that they were authorized to take no less than was due under the mortgage, and who claimed that the full amount of the indebtedness had become due. On April 3, 1896, the defendant deposited with the Clerk of the Superior Court of Durham County $94.00 principal and interest money, and $8.85 costs, the same being the full amount of the costs then due, and left with the Clerk and took receipt therefor.

The sums referred to in the receipt were continuously on deposit with the Clerk since the 3d day of April, 1896, being enough when added to the payment above to make the sum of $350.00 and interest referred to in the mortgage.

On the day before the plaintiff instituted this action he made demand upon the defendant for the full amount due, which was refused. He also at the same time demanded the possession of the goods described in the pleadings and under the agreement, which was refused.

At the close of the evidence, after argument by the counsel for the plaintiff and defendant, his Honor directed the jury to answer the first issue "No," to which instruction the plaintiff excepted. His Honor also instructed the jury that the answer to the second issue was the value of the goods at the date they were seized by the plaintiff, and that the answer to the third issue was the full amount of $730.00 stated in the agreement, with interest thereon under the terms of the agreement, subject to the credits of the weekly payments, which amount to $261.00, of the $100.00 payment, and the $94.00, the amount of the deposit in the Clerk's office.

To his Honor's instruction as to the measure of damages the plaintiff excepted.

The jury answered the second issue "$552.40" and the third "$290.60", and his Honor rendered judgment that the plaintiff recover nothing and that the defendant recover of the plaintiff $304.40 with interest from 20th June, 1897, and costs. From this judgment plaintiff appealed, assigning as error the instructions to the jury.

Messrs. Boone & Bryant, for plaintiff (appellant).
Messrs. Winston & Fuller, for defendant.

CLARK, J.: The appellee's motion to dismiss for failure to print part of "case on appeal" must be disallowed. As the rule requires the "case on appeal" to be printed, when other matter is referred to and ordered to be made a part of the case on appeal, the Court will not take up time debating whether such "exhibit" is material or not, the order making it a part of the case being conclusive. *Barnes* v. *Crawford*, 119 N. C., 127; *Fleming* v. *McPhail*, at this term. Here a receipt which is embraced in the "case on appeal" merely recites that it is in accordance with terms embraced in the answer but does not purport to make the answer a "part of case on appeal." The practice as settled by the rules of Court is that those parts of the record which are required to be printed by Rule 28 (119 N. C., 940) *i. e.*, the judgment, case on appeal, exceptions, and issues are *per se* material, and if they are not printed in full, Rule 30 requires that the appeal shall be dismissed. But the pleadings are not so required to be printed (except when the case comes up on a demurrer) unless material, and if they are material and not printed, the Court will not dismiss but will simply order the additional printing. Rule 32.

Rules 28, 30 and 32 set out all this so plainly (119 N. C., 940, 941, and 942) that no time ought to be lost hereafter in discussing them.

It is true that, in the absence of a stipulation to the contrary, a mortgage to secure a debt payable in installments cannot be foreclosed till default in the last payment. *Brame* v. *Swain*, 111 N. C., 540; *Harshaw* v. *McKesson*, 66 N. C., 266. But here the mortgage expressly states that upon default in any installment all were to become due and the mortgagee could "proceed to collect under the powers herein given". *McIver* v. *Smith*, 118 N. C., 73; 2 Cobbey Mortgages, Sec. 852. The exercise of the power to declare the deferred payments due was held optional, and if not exercised did not put the statute to running (*Capehart* v. *Dettrick*, 91 N. C., 344; *Barbour* v. *White*, 37 Illinois, 164, *Chapin* v. *Whitsett*, 3 Colorado, 315) but no question of that kind arises as by taking out the proceedings herein the plaintiff exercised his option. 8 Am. & Eng. Enc., 194. The mortgagor being in default on some of his installments, the mortgagee was within his right when he elected to take the goods in possession, for the $100 derived from sale of cattle, it was stipulated, were not to be credited on the weekly instalments. But there is another stipulation that, upon the payment of $350 upon the weekly instalments, the mortgage should be released upon the stock of goods, leaving it in force only as to the realty. The mortgagor tendered the plaintiff and paid into the Clerk's office (where it has continuously remained) for his benefit on April 3, the sum of $94.00 which, added to previous payments (exclusive of the aforesaid $100 from sale of cattle) made the full sum of $350. *Eo instanti* the mortgage on the personalty was released, *Shattuck* v. *Cole*, 91 Mich., 580, and, the costs to that date having also been paid into the Clerk's office at the same time, the plaintiff should have discontinued his action.

Even if the balance necessary to release the mortgage on the personalty had not been paid in before the attempted sale on April 13, that sale was invalid. *Alston* v. *Morphew*, 113 N. C., 460, citing *Blount* v. *Mitchell*, 1 N. C. The goods were not in plain view but were in a store 100 to 150 yards off from the place of sale, and moreover they were sold in a lump, which was calculated to make them bring much less than their value. The mortgagor is in the power of the mortgagee and the Courts require that such sales like those made under execution shall be made with such reasonable care as shall produce the best results. *McNeely* v. *Hart*, 30 N. C., 492; *Ainsworth* v. *Greenlee*, 7 N. C., 470.

Upon the first issue the burden being upon the plaintiff and there being no evidence tending to support his contention, the Court properly directed the verdict thereon to be rendered against him. *Spruill* v. *Insurance Co.*, 120 N. C., 141; *State* v. *Riley*, 113 N. C., 648. The measure of damages upon the second issue was strictly the value of the goods on March 10, when the defendant first tendered the balance necessary under the terms of the mortgage to release it as to the goods seized, and plaintiff refused to release them. The plaintiff lawfully caused them to be seized on

March 6th, when there was an installment due, but in the absence of any evidence tending to show a depreciation in their market value during the four days between the lawful seizure and the unlawful refusal to return, it was harmless error to charge that the value should be assessed as of the date of seizure. We fail to see how the plaintiff can object to the "allowance of interest" on the third issue.

No error.

MARY B. GREGORY et al. v. JOHN BULLOCK et al.

Contract—Guaranty—Evidence.

On the trial of an action, it appeared that defendant wrote to plaintiff saying: "When S. is ready to cut ties if you can agree between you as to the price, no doubt I can arrange the payment of the money satisfactory to you." This was held in former appeal to be no evidence of a guaranty on part of defendant to pay for the ties. On a subsequent trial, a letter of later date from the defendant was offered as evidence of the contract, as follows: "At the request of S. I beg to herewith hand you check for $100 which has been charged to his account in part payment of ties. Referring to your favor of 27th ult., I do not care to discount any more papers at bank rates." *Held*, that such letter contains no evidence suitable to be submitted to the jury to show a sale of ties to the defendant or any guaranty for payment by S. and, being only cumulative and of the same kind in substance as the former letter, does not constitute a link in the chain to establish the contract.

CIVIL ACTION tried before *Allen*, *J.*, and a jury at April 1897, Term of GRANVILLE Superior Court. At the close of the plaintiff's evidence the defendant moved to dismiss the complaint or for judgment as in case of non-suit which motion was granted and plaintiff appealed.

Messrs. J. W. Graham and *P. C. Graham*, for plaintiffs (appellants).

Messrs. Winston, Fuller & Biggs and *T. T. Hicks*, for defendants.

FAIRCLOTH, C. J.: On the former hearing of this case (120 N. C., 260) it was held that the evidence, contained in the letters between the parties, failed to show a contract or a guaranty on the part of defendant to pay for the trees sold by plaintiff to Smith. In addition, the plaintiff now presents another letter from defendant to plaintiff dated April 1, 1895, as evidence to be submitted to the jury on the issue of indebtedness. The letter was in these words: "At the request of R. T. Smith I beg to herewith hand you check for $100. which has been charged to his account in part payment of ties. Referring to your favor of 27th ulto., I do not care to discount any more papers at bank rates." This letter itself certainly fails to show any sale of ties to the defendant or any guaranty for payment by Smith, but rather implies, and is consistent with, the statement of plaintiff that she sold the trees to Smith. The plaintiff insists, on the strength of *Weeks* v. *Railroad*, 119 N. C., 740, that this letter is a link in the chain to establish a contract, which should go to the jury. The difficulty is that this letter does not supply a missing link, but is only cumulative and of the same kind in substance as those letters considered in the former opinion. If one letter does not contain evidence suitable to be submitted to a jury, the addition of another of the *same kind* would not change the *character* of the evidence or make it sufficient to be heard by a jury.

Affirmed.

G. W. DAVISON et al. Trustees of Davis & Gregory, v. WEST OXFORD LAND COMPANY.

Contract for Purchase of Land—Vendor and Vendee—Repudiation of Contract—Counter-claim for Money Paid on Purchase.

1. When a party makes a contract for the purchase of land and then repudiates it, he cannot recover money paid thereon.
2. Where, in an action against a corporation for the balance due on a contract for the sale and purchase of land, the defendant denied the contract and set up a counter-claim for payments made by its officers without authority, to which there was no replication and, on the trial, the jury found that there was no contract; *Held*, that, notwithstanding the plaintiff's failure to reply to the alleged counter-claim, the defendant cannot recover thereon, since the payments upon which the counter-claim was based could not have arisen upon the "same transaction" alleged in the complaint, but found by the jury not to have taken place between the parties.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at January Term, 1897, of GRANVILLE Superior Court. The facts appear in the opinion of the Court. Under the instruction of his Honor, the jury found that defendant was not entitled to recover on its alleged counter-claim, and from the judgment thereon the defendant appealed.

Messrs. J. W. Graham and *A. W. Graham*, for defendant (appellant).

Mr. A. J. Field, for plaintiffs.

MONTGOMERY, J.: The plaintiffs, as trustees of Davis & Gregory, brought this action to recover the balance of the purchase money for a tract of land lying in and near Oxford, known as the "Johnson Land," which they alleged the defendant company had contracted to buy from them. The defendant denied that it ever contracted to purchase the land, and averred that certain acts, done by two of its officers, which the plaintiffs claimed were partial payments upon the purchase price of the land, were *ultra vires* and done without the knowledge or consent of the defendant and without its subsequent ratification; and the defendant also sets up as a counter-claim against the plaintiffs, the amounts which those officers had, as it claims, unlawfully paid as payments on the land. No replication was made by the plaintiffs to the matter set up as a counter-claim. Upon issues submitted the jury answered that the defendant had not contracted with the plaintiffs for the purchase of the land, and that the plaintiffs were not indebted to the defendant on account of the counter-claim set up by it.

The only assignment of error by the defendant upon the appeal was to the charge of his Honor, which was as follows: "When a party makes a bargain to purchase land and then repudiates the contract, he cannot recover money paid on the contract. I instruct you upon the pleadings and evidence in this case that defendant is not entitled to recover, and you will answer the 6th issue "No"." Defendant excepted.

There was no error in the instruction of his Honor. Whenever a counter-claim is pleaded, of course the plaintiff must make replication or the counter-claim will be taken as admitted. But, in the case before us, the matter which was pleaded as a counter-claim was not in law and fact one. The jury found that there was no contract between the parties; and, therefore, the matter set up as a counter-claim could not have arisen upon the same transaction which was alleged by the plaintiffs to have taken place between them and the defendant, for the defendant in the answer denied that there ever had been such a transaction as that declared on in the complaint and the jury, upon the evidence submitted, said that there was no such transaction. *Code*, Section 244, Sub. Sections 1, 2.

No error.

J. S. MERRITT v. W. W. KITCHIN, Trustee.

Mortgagor of Stock of Goods left in Possession—Power to Sell Before Default—Mortgage Deed, Construction of—Patent Ambiguity.

1. One who makes a deed of trust for the purpose of securing the purchase price of a stock of goods and is allowed to remain in possession to conduct the business until default in specific payments, may give a valid title to any article included in the trust deed before his default and surrender of the goods to the trustee.
2. Where the conveyancing clause of a deed of trust specified certain articles situate in a certain store, among them "one soda fountain," and, continuing, conveyed "all other property whatsoever in said store room" and it was admitted that there were two soda fountains in the room, one of which was set up in use and the other not; *Held*, that both fountains were covered by the deed, the conveyancing clause being broad enough to include everything in the store room at the time of its execution, although some of the articles were specified therein.
3. Where, in the trial of an action, the controversy was whether a certain soda fountain had been conveyed by a deed of trust which, by its terms, conveyed specifically "one soda fountain" and other articles in a certain store room "and all other property whatsoever" in such store room, and it was admitted that there were two soda fountains in the store room, it was error to submit the deed of trust to the jury to say whether or not, as a fact, the fountain in question was intended to be conveyed, there being a patent ambiguity not explainable by parol testimony and the construction of the deed being a matter entirely of law and for the Court.

CIVIL ACTION, tried before *Allen, J.*, and a jury at April Term, 1897, of PERSON Superior Court. There was judgment for the plaintiff and defendant appealed. The facts appear in the opinion.

Messrs. Boone & Bryant, for plaintiff.
Mr. A. L. Brooks, for defendant (appellant).

MONTGOMERY, J.: Barrett bought the interest of his former partner, A. J. Mitchell, in the stock of goods and credits of the firm, took possession and executed a deed of trust to W. W. Kitchin to secure the deferred payments of the purchase price. The deed provided that if default should be made in the payment of the instalments the trustee was to take possession, sell the goods and apply the proceeds as required by the deed. Default having been made, the trustee sold the property—that which was left over after the sales made by Barrett, while he was in possession. Among the articles sold by the trustee was a portable soda-fountain at the price of $27.50. The plaintiff claimed that article by purchase from Barrett while the latter was in possession of the goods, and contended that it was not conveyed in the deed of trust.

In the stock of goods in the store rooms occupied by the firm of Barrett & Mitchell at the time of the execution of the deed of trust, there were two soda fountains; one in position and used in the business, and, the other, the one claimed by the plaintiff and not in actual use. The plaintiff's contention, that the fountain which he claims was not conveyed in the deed, is based on the fact that in that instrument there are specifications of particular property conveyed, and only one fountain was conveyed in express terms and that therefore, naturally, that one was the larger one and the one in use. We will examine that position. If in the deed of trust there had been no other language affecting the specifications of property, no words extending the property conveyed in the deed beyond the specifications, then no evidence would have been competent to show which one of the soda fountains was intended to be conveyed. *Spivey* v. *Grant,* 96 N. C., 214. But there was other language in the deed explaining and extending the restricted terms as to the specified property conveyed.

We are of the opinion that the conveyancing clause of the deed is broad enough to include everything, the whole of the property, in the store rooms of the partners at the time of the execution of the deed of trust, although some of the articles were specified therein. *Kelly* v. *Fleming*, 113 N. C., 133. The language of the deed of trust on that point is as follows: "Now, wherefore, in consideration of the premises and of one dollar to him in hand paid, the party of the first part hath bargained and sold and by these presents doth bargain and sell unto said W. W. Kitchin, trustee, and his assigns the following property, *to-wit:* all the drugs, medicines, wares, merchandise, bottles, prescription cases, books, and all other property whatsoever, now in the store room occupied by the said late firm situated in Roxboro, said State, on Main street, between the store rooms of W. E. Webb and the new building of Pass & Carver, belonging to C. S. Winstead, including all furniture, the iron safe, the show cases, the soda water fountain and any and all other property formerly belonging to said firm, and also whatever goods, wares, merchandise and other stuff and furniture which said party of the first part may buy or add to said property herein mentioned, it making the stock of goods now in said store; this meaning to convey the entire stock both now in and hereafter to be in store room or store rooms, including all the stuff said party of the first part owns or may own therein in said building of C. S. Winstead; also all the accounts, credits and choses in action of the late firm of Barrett & Mitchell."

The plaintiff waived the alleged tort of the defendant and brought this action before a Justice of the Peace for the value of the fountain. On the trial in the Superior Court his Honor submitted the simple issue, "Is the defendant indebted to the plaintiff, and, if so, in what sum?" In the language of the case on appeal, which is signed by the attorneys of both plaintiff and defendant, "his Honor submitted the said deed of trust to the jury to say whether or not, as a fact, the same (soda fountain) was intended to be conveyed." That was error. The deed of trust having been proved or admitted, and it having been admitted that there were two soda fountains in the store rooms, the conveyance of one soda fountain was a patent ambiguity which could not be explained by parol testimony; the construction of the deed in that respect was one entirely of law and for the Court. It is unnecessary to cite the authorities on this point.

But, notwithstanding that error, the judgment of the Court below must be affirmed; for it appears in the case on appeal, which is signed by the attorneys of both plaintiff and defendant, that Barrett while in the possession of the goods sold the soda fountain, the subject of this suit, to the plaintiff. Barrett had a clear right to sell any of the property conveyed in the deed of trust under the express terms of the deed, for he was permitted to remain in possession for that purpose. So the plaintiff got title to the soda fountain by virtue of the sale to him by Barrett. The particulars of the sale to the plaintiff do not appear on the record, and it might have been that, if they had, the transaction would not in law amount to a sale.

We observe the use of some words in the case on appeal which imply doubt on the question of the sale but, as the point seems to be conceded by the defendant, we are not at liberty to go behind the record and thereby disturb the agreement of the parties.

Affirmed.

W. A. FAISON et al. v. E. P. WILLIAMS, et al.

Special Proceedings—Appeal from Clerk—Jurisdiction of Judge to Hear and Determine or Remand the Proceedings.

1. Under Ch. 276, Acts of 1887, amendatory of Section 255 of *The Code,* the Judge, to whom a cause is sent by appeal or otherwise from the Clerk of a Superior Court, has full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the Clerk to be proceeded with by him.
2. When three of four plaintiffs in a proceeding for partition moved, upon a petition filed in the cause before the Clerk, to set aside the report of the Commissioners on the ground of newly discovered testimony and to amend the complaint by inserting an allegation averring sole seizin in themselves and that the fourth party plaintiff was not entitled to any interest in the premises, and the Clerk refused the motion and sent the cause, on appeal, to the Judge; *Held,* that the Judge had power in his discretion to set aside the judgment for newly discovered testimony and to permit the amendment asked for. In such case, when the proceedings are remanded the appellant will have an opportunity to answer the amended complaint and to present issues of fact arising thereon.

MOTION in the cause heard before *Allen, J.,* at Chambers in Kinston, on appeal from a judgment of the Clerk of the Superior Court of GREENE County. His Honor granted the motion and plaintiff, Josephine Williams, appealed.

Messrs. Swift Galloway and *G. M. Lindsay,* for Josephine Williams (appellant).
Messrs. Allen & Dortch, contra.

CLARK, J.: Three of the four plaintiffs in a proceeding for partition moved, upon a petition filed in the cause before the Clerk, to set aside the report of the Commissioners on the ground of newly discovered testimony and to amend the complaint by inserting an allegation averring sole seizin in themselves, and that the fourth party plaintiff was entitled to no interest in the premises. The Clerk refused leave to amend and confirmed the report, whereupon the petitioners appealed.

It is unnecessary to consider whether the Judge could reverse the action of the Clerk in refusing leave to amend, for the Act of 1887, Ch. 276 (amending section 255 of *The Code*) provides that whenever a cause is sent up to the Judge *for any ground whatever* the "Judge shall have jurisdiction" and may either fully determine the cause himself or make orders therein and send it back to be proceeded in by the Clerk. *Ledbetter* v. *Pinner*, 120 N. C., 455; *Lictie* v. *Chappell*, 111 N. C., 347; *Sudderth* v. *McCombs*, 67 N. C., 353; Clark's Code, 198 (2nd Ed.) The case having been taken to the Judge by the appeal, he was thereupon seized with full jurisdiction, and had power in his discretion to set aside the judgment for newly discovered evidence (*Vest* v. *Cooper*, 68 N. C., 131; *Carson* v. *Dellinger*, 90 N. C., 226; *Flowers* v. *Alford*, 111 N. C., 248) and to permit the amendment asked for, *Code*, Sec. 273; *Brendle* v. *Reese*, 115 N. C., 552; *Maxwell* v. *McIver*, 113 N. C., 288; *Sinclair* v. *Railroad*, 111 N. C., 507. When the case goes back the appellant will have an opportunity to answer the allegations in the amended complaint and present such issues of fact and law arising thereon as she may be advised. Had the Court below in its discretion refused the amendment it might have been difficult for the plaintiffs, other than the appellant, to have raised the issues they desire in another proceeding in the face of the possible estoppel of a judgment in this action.

No error.

J. M. JONES v. THEOPHILUS BEST.

Action for Recovery of Land—Failure of Defendant to Answer or File Bond—Judgment by Default.

Where, in an action to recover possession of land, the defendant failed to file answer or the bond required by Section 237 of *The Code* and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under Section 390 of *The Code,* to give judgment against the defendant for possession of the land, without damages.

This was a civil action for the recovery of land, in which the plaintiff filed her complaint duly verified at November Term, 1896, of GREENE Superior Court, within the first three days thereof, at which term the defendant was allowed thirty days in which to file his answer and undertaking, or comply with the Statute.

At February Term, 1897, the defendant having failed to answer, the plaintiff moved for judgment for want of an answer. The defendant moved to be allowed, then, to file answer, and to defend without giving bond. The defendant's motion was denied, and the Court gave the judgment for possession of the land, without damages. The defendant excepted and appealed.

Mr. W. C. Monroe, for plaintiff.
Mr. G. M. Lindsay, for defendant (appellant).

MONTGOMERY, J.: This action was instituted for the possession of a piece of land which the plaintiff alleged was being unlawfully withheld from her by the defendant. No answer was filed, and for want of answer judgment was rendered against the defendant for the possession of the land, without damages. The counsel of the defendant insisted here that, under section 385 of *The Code*, such judgment was not lawful. Section 390 of *The Code,* however, provides that in actions like the present one the plaintiff is entitled to judgment for the relief demanded in the complaint unless the defendant files the bond required of him by Section 237 of *The Code,* or is excused from giving the bond before answering. He did not answer nor file the bond nor ask the Court to file the answer without giving the bond until the time to answer had expired. There is no error.

Affirmed.

W. A. WRIGHT et al. v. G. W. WESTBROOK.

Deed, Construction of—Life Estate—Limitation Over—Power of Disposal by Life Tenant.

Where land was conveyed to A for life, with limitations over in the event of the happening of certain contingencies, but with full power in A to dispose of the same with the written permission of her husband; *Held,* that A and her husband can convey a good title in fee to a purchaser.

Controversy submitted without action and heard before *McIver, J.*, at April Term, 1897, of NEW HANOVER Superior Court. The facts appear in the opinion. His Honor held that the plaintiffs could convey a good title, to the land for the purchase of which the note sued on was given and gave judgment accordingly from which defendant appealed.

Mr. T. W. Strange, for plaintiffs.
Mr. J. D. Bellamy, for defendant (appellant).

FAIRCLOTH, C. J.: This is a controversy without action submitted under *The Code,* Sec. 567. The plaintiff, W. A. Wright, owned the land in fee simple and executed a deed to his intended wife who afterwards intermarried with him.

Both are still alive and have contracted to sell said land to the defendant, and the question is, can they make the defendant an indefeasible title? The deed, regular in all respects, conveys the land to the said "Louisa G. Holmes (now the *feme* plaintiff and wife of said Wright) for the term of her natural life, *with full power of disposing of the same*, his permission in writing being first obtained, and remainder to the children of the said Louisa G. Holmes begotten by the said William Augustus Wright, all right, title, interest or estate, &c. But if the said Louisa G. Holmes should die in the life time of the said William Augustus Wright leaving issue by him living at her death, then the estate herein conveyed is to revert back and vest in the said William Augustus Wright and the heirs of his body begotten. But in default of such issue living at his death, then, after the decease of the said Louisa G. Holmes, the estate herein conveyed shall go to and vest in the heirs of the said William Augustus Wright."

We need not discuss the rights of parties in the event that the wife had died without exercising the power given her in the deed, either with or without children, or upon the death of the husband leaving his said wife surviving. These contingencies are not before us.

The provision in the deed "with full power of disposing of the same, his permission in writing being first obtained" is absolute and clear, with such permission of her husband. The contingencies that might arise in the event of death, as above stated, have not yet arisen and are subject to and dependent upon the wife's exercise of the power of disposition conferred by the deed from her husband.

Our opinion is that a proper deed by the wife and husband would convey a good title to the purchaser. *Stroud* v. *Morrow*, 52 N. C., 463. Judgment affirmed.

Affirmed.

H. EPPS v. W. H. SMITH.

Action for Penalty—Election Expenses—Gifts to Electors by Candidate in order to be Elected—Intent—Pleading—Repeal of Statute—Vested Rights.

1. There is a manifest difference between contributions made by a candidate for office for his part of the necessary expenses of a political campaign, or paying persons to assist in conducting his own personal canvass. and the giving of money or other things of value to electors in order to be elected.
2. In an action for the penalty imposed by Section 42 of Chapter 159, Acts of 1895, it is not necessary that the complaint should allege a wilful and corrupt intent on the part of the defendant in giving money, &c., to electors in order to be elected to office
3. In the trial of an action for the penalty given by Section 42 of Chapter 159. Acts of 1895, it appeared that the defendant in the statement of his expenses filed with the Clerk had stated that he gave $20.00 to a certain named elector who was of his own political party, "for services to the ticket" and there was testimony that such elector was opposed to the election of the defendant and had organized a club hostile to him and had worked for the rival candidate up to the day of the election when he was "quiet." The filed statement of defendant's expenses also showed that four other electors of a different political party from defendant's also received money and whiskey from him to be used by them "as best they could and thought proper" and "as they liked." There was further proof in the statement on the same line. *Held*, that there was sufficient evidence to be submitted to the jury on the issue they were trying, since, if they believed the testimony, the jury might reasonably have concluded that the defendant had used money and whiskey in order to be elected as charged in the complaint.
4. The repeal by Section 42, Chapter 185, Acts of 1897, of the penalty imposed by the Act of 1895, subsequent to the commencement of the action for such penalty, did not destroy the plaintiff's cause of action (Section 3764 of *The Code*).

DOUGLAS, J., dissents *arguendo.*

CIVIL ACTION tried before *Robinson, J.*, and a jury at May Term, 1897, of VANCE Superior Court.

The plaintiff introduced the sworn statement of election expenditures filed by the defendant in the office of the Clerk of the Superior Court of Vance County as required by Section 72, Chapter 159, Laws of 1895, in which (among others) appeared the following items:

"To Andrew Watkins, services (straight ticket),	$10 00
"To H. B. Eaton, for services to the ticket,	20 00
"To Giles Weir, two gallons whiskey (to be used as he thought proper),	3 80
"To Lovelace Young, one gallon of whiskey, (to be used as he thought best),	1 90
"To Joe and Phil. Hunt, to be used as best they could and thought proper,	5 00
"To Jim Gill, whiskey to be used as he wished	1 00
"To one gallon whiskey furnished R. M. Townes, to be used as he pleased,	1 75
"To half-gallon whiskey furnished to Dan'l Bullock, to be used as he pleased,	1 00
"To one gallon furnished J. A. Greenway, to be used as he liked,	1 60
"To one gallon furnished Henry Turner, to be used as he liked,	
"To one gallon furnished W. H. Reaves, to be used as he liked, "	

The statement filed also contained the following:

"The parties named above are all Republicans and are working for the straight Republican ticket as I am informed, except Mr. Weir and Mr. Greenway (and perhaps one more) and Joe and Phil. Hunt. I treated and drank with men of all parties before and during and since the campaign, but not with a view of influencing their votes, nor in aiding my election; would have done so if I had not been a candidate."

R. A. Field, a witness for plaintiff, testified: "I live in

Williamsborough; I know H. B. Eaton. During the campaign of 1896, Eaton favored and worked for Garrett for sheriff; he got up a Garrett club at my store. I think he continued for Garrett until the day of election, when he was quiet; he is a quiet man on election days—not the quietest nor the wildest man. He was dull on Garrett, and I tried to get him to work faster. I don't know how Eaton voted. I know Andrew Watkins; he was Chairman of the Republican Executive Committee for Williamsborough township; I don't know what his attitude was as to Smith, except that he told me that "the Republican Convention (of which he was a member) and the Populist Convention had agreed to nominate Garrett."

Cross-examined. He said: "I don't know that Watkins attended the second Republican County Convention, held August 22, 1896, (at which Smith was nominated for sheriff), as a delegate; I heard him say after his return from the Republican Convention, held in May, that they had fused on a satisfactory ticket. I know that Garrett was the candidate for sheriff."

Lovelace Malone, a witness for plaintiff, testified: "I don't know whether Eaton was a Smith, a Garrett or a Powell man. Andrew Watkins was Township Chairman of the Republican Committee; I heard Andrew Watkins say, at a meeting about ten days before the election, he had seen Holton in Henderson, and he advised that Garrett or Smith get off the ticket. I heard Andrew Watkins ask in a meeting in Williamsborough, the night before the election, if Williamsborough would endorse Garrett; he said he was not tied to either one."

Plaintiff rested his case.

His Honor being of opinion that there was not sufficient evidence to go to the jury, directed a verdict for defendant, and gave judgment accordingly. Plaintiff excepted and appealed.

Mr. T. M. Pittman, for plaintiff (appellant).
Messrs. W. B. Shaw and *T. T. Hicks*, for defendant.

MONTGOMERY, J.: This action was brought by the plaintiff to recover of the defendant the forfeiture pronounced against violations of Chapter 159, Section 42, of the Acts of 1895. The allegation is that in the times just preceding the last general election the defendant, who was a candidate for the office of Sheriff of Vance County, gave money and whiskey to various electors in order that he might be elected to that office. The chief evidence in the case against the defendant is furnished by his sworn statement of his election expenses filed under the requirement of Section 72 of the Act of 1895.

The language of the statute under which the action is brought is clear, and we think its meaning is also clear. It would seem almost impossible to confuse or confound the natural understanding of men as to the meaning of this law, by arguing that there is no difference between a contribution made by a candidate for office for his part of the necessary expenses of a political campaign or paying individual persons to help him conduct his own personal canvass, provided the electioneering be honest and the service duly rendered, and the giving of money or any other thing of value to electors in order to be elected. The first is the payment for proper services rendered, the last is the giving for no service rendered and for no return except that of the vote of the elector. The law contemplates that the elector shall not receive money for his vote, nor shall a candidate or any other person for him, give money to an elector in order that the candidate may be elected to office.

The defendant's counsel insisted here that it was necessary that the complaint should have alleged a wilful and corrupt intent on the part of the defendant to do the acts complained of. We are not of that opinion. It is the doing of the *particular act*, to-wit, giving money to electors in order to be elected that gives the cause of action, and the intent with which the act is done is not material except that the purpose must be to procure the election of the defendant. Even in statutory crimes, where the act itself is made indictable, this Court has held over and over again, that the intent is not to be considered except as to the intent to do the act forbidden. In *State* v. *Voight*, 90 N. C., 741, this Court said: "The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." In *State* v. *McBrayer*, 98 N. C., 619, the Court said: "When the language is plain and positive and the offence is not made to depend upon the positive wilful intent and purpose, nothing is left to interpretation." To the like effect are the decisions in *State* v. *Kittelle*, 110 N. C., 560; *State* v. *Downs*, 116 N. C., 1064; *State* v. *McLean*, at this term.

In the statement of the defendant, heretofore referred to, he said that he gave $20 to a certain named elector, who was of his own political party, "for services to the ticket." A witness was introduced for the plaintiff who testified that *that* elector was opposed to the election of the defendant to the office of Sheriff and had organized a political club hostile to him, and for his opponent; that he worked for the rival candidate in a half-hearted way until the day of election, when he was "quiet." The statement of the defendant also showed that four other named electors of a different political party from that of the defendant, received from him money and whiskey to be used by two of them "as best they could and thought proper," and by the other two "as they liked." There was further proof in the statement on the same line. We do not agree with his Honor that the above was not sufficient evidence to be submitted to the jury on the issue they were trying. The jury, if they believed the testimony, might reasonably have concluded that the defendant had used money and whiskey in order to be elected Sheriff of the County as charged in the complaint.

The Statute, Chapter 159, Section 42, of the Acts of 1895, under which this action was begun, was amended at the last session of the General Assembly, Chapter 185, Section 42; the amendment consisting in the striking out from the Act of 1895 the forfeiture of $400. The defendant's counsel argued that, notwithstanding the provisions of Sec. 3764 of *The Code*, which reads, "the repeal of a statute shall not affect any action brought before the repeal for any forfeitures incurred or for any recovery for any rights accruing under such statute," the repeal of the penalty clause after this action was begun took away the plaintiff's cause of action if he ever had any. The contention was that section 3764 of *The Code* was not in harmony with the Constitution, that instrument ordaining that "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightly appertains to it as a co-ordinate department of the Government." In his brief the defendant's counsel said: "It is admitted that this Section (3764) undertakes to define the meaning and effect of future legislation and to encroach upon the judicial power, and that it ought not to be allowed to do so." We do not understand how the Section of *The Code* referred to in the brief can be said to affect future legislation on the subject of penalties. There is nothing to prevent any succeeding General Assembly from repealing Section 3764, and in doing so leave to judicial determination if it should ever become necessary, the effect of the repeal. Neither do we see in that section of *The Code* any encroachment upon the power of the judiciary. In the case cited *Houston* v. *Bogle*, 32 N. C., 496, by the defendant's counsel, the question involved was the right of the General Assembly to declare in the Act, under discussion there, what the legal rights of the parties to the suit were before the passage of the Act, and where the Act had injuriously affected rights already vested. The Judge who delivered the opinion in that case stated the question in this language: "The statute was passed afterwards and the question is, can it have any effect upon the rights of the parties in this case or change the law so far as they are concerned from what it was at the time their rights vested." This question does not arise in the case before us.

The defendant's counsel called our attention to the fact that the Act under which this suit was brought had its origin in the Act of 1777, Chapter 116, Section 22, and he stated that he had been unable to find in our Reports a single case brought under its provisions during this century and more, except the one against his client. This may be so, and yet some enterprising citizen of Vance County, some genuine reformer, may have determined not to let this Statute perish from "*innocuous desuetude.*" It may be of consolation to his client for him to believe that in his trouble, wherever it is known, he has the deepest sympathy of many of his brother officers; and from the argument of his counsel here it may not be rash to infer that both client and attorney feel, with redoubled conviction of its truth, even if the client should be convicted, the force of the scriptural declaration that the men upon whom the tower of Siloam fell were no greater sinners than those who escaped.

There was error in the ruling of his Honor and there must be a new trial.

New trial.

DOUGLAS, J., dissenting: This was a civil action brought by the plaintiff to recover the penalty imposed in Section 42, Chapter 159, of the laws of 1895. The plaintiff introduced the sworn statement of election expenditures filed by the defendant in the office of the Clerk of the Superior Court of Vance County as required by law, and also the evidence of two witnesses. When the plaintiff had rested his case, the Court, being of opinion that there was not sufficient evidence to go to the jury, directed a verdict in favor of the defendant. In this I think there was no error.

The section under which this action is brought is as follows: "That any person who shall, at any time before or after an election, either directly or indirectly, give or promise to give any money, property or reward to any elector, or to any county or district in order to be elected, or to procure any other person to be elected a member of the General Assembly, or to any office under the laws of this State, shall forfeit and pay $400 to any person who will sue for the same, and shall be guilty of a misdemeanor; and any person who shall receive or agree to receive any such bribe shall also be guilty of a misdemeanor."

Section 72 of the same Act provided that: "Every candidate who is voted for at any public election, held within this State, shall, within ten days after such election, file as herein provided an itemized statement showing in detail all the monies contributed or expended by him, directly or indirectly, by himself or through any other person in aid of his election. Such statement shall give the names of the various persons who received the monies, the specific nature of each item, and the purpose for which it was expended or contributed." The same Section specifies the manner of verification and place of filing, and concludes as follows: "And any candidate who shall neglect or refuse to file such statement shall forfeit his office, if any he has."

It is a matter of common knowledge that the successful candidate, from the highest to the lowest, filed such statements showing in some instances large expenditures "in aid of their election." The defeated candidates generally neglected this duty, as they were perfectly willing to forfeit an office which they had never obtained, and did not care to erect any further memorials of their vanished hopes.

Sections 42 and 72 must be construed together, and as it is evident that the latter section contemplates legitimate expenses, it is equally evident that the former section applies only to illegitimate expenditures. To say that the phrase "in order to be elected" and "in aid of his election" mean one and the same thing, and that one is lawful and the other unlawful, is a contradiction; and we are at a loss to find any authority for holding that a strict compliance with Section 72 is in itself a confession of guilt under Section 42, as suggested by the plaintiff. If any further evidence of the legislative intent were needed, it is found in the concluding paragraph of Section 42, which refers to the Act therein prohibited as "such bribe." The word "bribe" has a distinct and settled meaning, and always includes some corrupt element.

We think there was no evidence of bribery, or at least a mere scintilla, and that his Honor properly directed a verdict in favor of the defendant, the burden of proof resting as it did upon the plaintiff. *Wittskowsky* v. *Wasson*, 71 N. C., 451; *Best* v. *Frederick*, 84 N. C., 176; *Brown* v. *Kinsey*, 81 N. C., 245; *State* v. *White*, 89 N. C., 462; *State* v. *Powell*, 94 N. C., 965; *Covington* v. *Newberger*, 99 N. C., 523; *Spruill* v. *Insurance Co.*, 120 N. C., 141.

The statement of expenditures was carelessly and even imprudently drawn, but I do not feel called on to place upon the defendant's words the worst possible construction, in order to bring him within the penalty of the Statute that has been repealed.

B. F. MITCHELL & CO. v. C. M. WHITLOCK.

Trustee, Liability of for Purchase of Goods—Trial—Confession and Avoidance—Burden of Proof.

1. A trustee purchasing goods, or incurring any other liability on account of his trust, is personally liable for the payment thereof unless his liability is limited by an agreement, expressed or implied, with the creditor.
2. Where defendant in an action for goods sold and delivered admitted obtaining the goods but alleged that he had bought them as trustee of an assigned estate and that credit had been extended to him as such, which was denied by the plaintiff, it was error on the part of the trial Judge to instruct the jury that the burden was on the plaintiff to show by a preponderance of evidence that he had sold and delivered the goods to the defendant individually. Defendant's answer in such case was in the nature of a plea of confession and avoidance and, having admitted obtaining the goods, he assumed the burden of proving the truth of his plea.

CIVIL ACTION tried before *Allen, J.*, and a jury at September Term, 1897, of NEW HANOVER Superior Court. There was a verdict for the defendant and, from a judgment dismissing the action, the plaintiff appealed.

Messrs. Frank McNeill and *J. H. Gore*, for plaintiff (appellant).

Mr. Geo. Rountree, for defendant.

DOUGLAS, J.: This was a civil action to recover the value of goods sold and delivered by the plaintiff to the defendant. It is admitted that the defendant ordered the goods as trustee and that they were so charged to him on the books of the plaintiff. The defendant testified that before sending any orders as trustee, he showed the plaintiff the written agreement containing the terms of the trust, and explained to him that he would run an account as trustee if he would agree to it; and that the plaintiff did agree to it and took the account with that understanding. This the plaintiff denies, and says that the defendant did not disclose to him for whom he was trustee, or any of the conditions of the trust, and that he sold the goods to the defendant upon his individual credit. The jury found for the defendant.

Among other instructions, his Honor charged the jury "That the burden of proof was on the plaintiff to make out his case, and that if the plaintiff had failed to show by a preponderance of evidence that he had sold and delivered the goods to defendant individually, then they must answer the issue in favor of the defendant." In this we think there was error. The answer of the defendant was in the nature of a plea of confession and avoidance. Having admitted that he obtained the goods, he assumed the burden, and nothing else appearing the plaintiff would be entitled to judgment. A trustee purchasing goods, or incurring any other liability on account of his trust, is personally liable for the payment thereof unless his liability is limited by an agreement, expressed or implied, with the creditor. The liability of the trust estate is not now before us, the only question being the individual liability of the defendant. It is admitted that the defendant might have limited his liability by such an agreement with the plaintiff as he alleges to have been made, but, having alleged such an agreement, he must prove it. Proof always implies at least a preponderance of testimony.

The decision of this case depends more upon the application of elementary principles than precedents, but we think its general principles are analagous to those discussed in the two cases of *Banking Co.* v. *Morehead*, 116 N. C., 410, 413. For error in the charge of the Court a new trial must be ordered.

New trial.

SINGER MANUFACTURING COMPANY v. JAMES O. GRAY.

Lease—Conditional Sales—Purchase on Instalment Plan—Evidence.

1. A written contract although called a "lease on the instalment plan" and not providing that title shall pass upon the completion of the payment of the instalments, may constitute a "conditional sale" of an article where the same has been delivered upon a payment in advance and an agreement to pay a certain sum each month for a series of months.
2. In the trial of an action for the recovery of a machine on failure to pay an instalment due under a contract relating to it and called a "lease" but which contract did not provide that the defendant should become the owner upon payment of all the instalments, evidence was competent to show that the defendant was to become such owner when the machine should be paid for, whether the transaction is considered an incomplete contract or a conditional sale; and, in such case, it was not error to submit the question of ownership to the jury.
3 Where it appeared that such contract was for a new machine worth $45, it was competent to prove that the one delivered was an old machine and worth not more than $20.

CIVIL ACTION tried before *McIver, J.*, and a jury at March Term, 1897, of JONES Superior Court. The facts appear in the opinion. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

Mr. D. L. Ward, for plaintiff (appellant).
Messrs. Simmons & Ward, for defendant.

FURCHES, J.: The plaintiff, through its agent Brown, delivered to the defendant a sewing machine, under a written contract, which plaintiff calls a lease on the instalment plan—so much to be paid at the time of delivery and then an agreed sum per month, until the estimated price should be paid. When the defendant had paid $25 on this machine, but was behind with some of his monthly instalments, the *enterprising* agent of the plaintiff took this machine from defendant, but *graciously* agreed to let the defendant have another machine, estimated to be worth $45 at the price of $55, upon the following *favorable terms*— that the $25 already paid, and $6 in addition to be paid when the new machine should be delivered, were to constitute the first month's rental, and then the defendant was to pay an additional rental of $3.00 on the 29th day of each month for seventeen months, making in all $82.

It was not stated in the written contract who was to be the owner of the machine when all these instalments were paid. But it was stated that if any of these monthly instalments were not made on the day they were due (the 29th of the month) the plaintiff was authorized and empowered to enter the premises of the defendant and take the machine. Defendant paid $34 of the $55 leaving a balance of $21 still due the plaintiff, as plaintiff contended, thus having paid the plaintiff $25 on the machine taken from the defendant, and $34 on the one sued for in this action—making in all the sum of $59. But the defendant after paying $34 on the second machine again fell behind with his monthly instalments. And again this enterprising agent is on hand demanding the surrender of this second machine. This time the defendant refused to surrender and this action is brought for possession of the machine.

There was evidence going to show that this second machine was to be a new machine, worth $45 at cash sale. That the machine delivered was not a new machine, but an old machine, newly varnished over and not worth more than $20 when delivered to the defendant.

The defendant is evidently a man in the humble walks of life, as he is a marksman, not being able to write his name to the contract. The plaintiff objected to the evidence tending to show that it was a second hand machine that plaintiff delivered to defendant, and not worth more than $20. But it was allowed by the Court and plaintiff excepted.

On the cross examination of the agent Brown, he testified in response to questions asked by defendant "that he did not know whose machine it would have been if defendant had paid the whole $55.00; that he had been paid the whole $55 by a good many others to whom he had sold machines under the same form of contract, and he had never troubled them for the machines, nor for any further rent." This was objected to as the other evidence was, upon the ground that it tended to vary the terms of a written contract, which could not be done. But the Court allowed the evidence and plaintiff again excepted.

The plaintiff in its assignment of errors again excepts because the Court did not charge the jury that, as a matter of law, the contract was a lease and not a conditional sale.

There were no written pleadings, the action having been commenced before a Justice of the Peace. And upon the evidence the Court submitted without objection two issues to the jury as follows: 1. "Is the plaintiff the owner and entitled to the possession of the property described in the complaint? Answer, No. 2. What was the cash value of the property at the time the action was brought? Answer, $16.

If this contract had stated in terms that when the $55 was paid, the machine should belong to the defendant, it would have fallen directly under the decisions of this Court in *Puffer* v. *Lucas*, 112 N. C., 377; *Crinkley* v. *Egerton*, 113 N. C., 444; *Clark* v. *Hill*, 117 N. C., 11; *Barrington* v. *Skinner*, Ibid, 47, and would be a conditional sale.

A conditional sale is a *sale* but upon condition, in which the purchaser sustains the relation of a mortgagor, and the seller that of the mortgagee. And a discharge of the debt

—the condition—by the purchaser is a discharge of the lien of the seller. Then, if this was a conditional sale and the defendant had discharged the debt, this discharged the plaintiff's lien and his right to possession of the machine.

It does not seem to us that because the *enterprising* agent of the plaintiff saw proper, in preparing this contract, not to say whose machine it would be when paid for, it could deceive any one. When a man buys and pays for a thing, the law gives him the title—makes him the owner. And it seems to us that the Court might have instructed the jury, as a matter of law, that it was a conditional sale. But if it is considered as an incomplete contract (as we suppose his Honor considered it) then the evidence elicited on the cross examination of Brown tended to show that the defendant was to be the owner when it was paid for, and was competent. And if it was a conditional sale upon its face, it could have done the plaintiff no harm to prove that it was. Therefore, the Court committed no error in refusing to charge that the contract was a lease. Nor is there any error in admitting the evidence, of which the plaintiff can complain.

The only other exception is that the Court admitted evidence tending to show that it was a second hand machine. There was no error in this. It cannot be that to show that a party did not comply with the terms of his contract is to vary the terms of the contract. This is new to us. There was evidence that it was to be a new machine which, as shown, would have been worth $45. This evidence tended to show that it was an old machine, newly varnished, that the plaintiff delivered to the defendant, not worth more than $20. If this was true, the plaintiff had broken the contract, and the most that he could claim in law or equity was the value of the machine he had delivered to the defendant. This evidence was competent and pertinent to show the breach of the contract by the plaintiff, and this being shown—found by the jury—then to show the value of the machine delivered. The jury found upon the evidence that the machine, when the suit was commenced, was worth $16 and judgment was entered for the defendant. There is no error. Judgment affirmed.

Affirmed.

W. N. HARRISS, et al. v. S. P. WRIGHT, et al.

Constitutionality of Statute—Legislative Power—Delegation of Legislative Power.

1. Under Section 14 of Article 7 of the Constitution providing that the General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of that article (except sections 7, 9 and 13) and substitute others in their stead, all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the Legislature; and hence,
2. Chapter 150, Acts of 1897, amending the charter of the City of Wilmington and providing for the election of one alderman only for each ward and the appointment by the Governor of the State of one alderman for each ward of said city, is constitutional and valid.
3. The delegation to the Governor of the State of the power of appointing a portion of the aldermen of a city is within the scope of the power entrusted to the discretion of the Legislature by Section 14, Article 7, of the Constitution

CIVIL ACTION, (being a consolidation of three separate actions), involving the title to the offices of Mayor and Board of Aldermen of the City of Wilmington, heard before *McIver, J.*, on the pleadings and facts agreed, at April Term, 1897, of NEW HANOVER Superior Court,

The Charter of the City of Wilmington, including the several Acts amendatory thereof, in effect prior to the Act ratified the 5th day of March, 1897, provided for the division of the City into five wards; the biennial election of two Aldermen from each of the wards; the holding of the election on the fourth Thursday of March of each year and the opening of registration books previous to the election.

At and before the passage of the Act of March 5th, 1897, the appellees were the Mayor and Aldermen of the City of Wilmington.

Under the unamended Charter the biennial election for Aldermen would occur on the fourth Thursday, the 25th day of March, 1897. No appointment of registrars, judges of election or provisions for opening the registration books, as required by the unamended Charter, was had.

An Act entitled "An Act to amend the Charter of the City of Wilmington" was ratified the 5th day of March, 1897, (Private Acts 1897, Chapter 150).

The Act provides for the election of Aldermen to be held according to the Charter of the City of Wilmington and the Acts amendatory thereto, except that the registration books may be opened for only ten days previous to the election. It also provides that there shall be elected by the qualified voters of each ward one Alderman only, and there shall be appointed by the Governor one Alderman for each ward.

After the passage of this Act, the Board of Aldermen, for the first time, on March 10th, 1897, called an election to be held on the 25th day of March, 1897, and on that day appointed to act in the several wards of the City, registrars and inspectors of election.

On March 11th and 12th there appeared in the newspapers published in the City of Wilmington the notice which is set out in full in the "Facts Agreed," giving notice that "an election would be held at the various polling places for the purpose of electing one Alderman from each of the five wards of the City."

On the 13th and 14th of March, 1897, there appeared in the same papers of said City a notice that "An election would be held on Thursday, March 25th, at the various polling places, for the purpose of electing Aldermen from each of the five wards of the City."

It will be observed that the first notice contained no date when the election would be held, but that the second notice corrects the first in this particular. The notices were not signed by any one.

The registration books were opened on the 13th day of March, 1897, twelve days before the election, conformably to the requirements of the Act of March, 1897—the amended Act. The election was held on the 25th day of March, 1897. It was fairly conducted. The electors, when voting, voted ballots with one name for Alderman, with the exceptions of one or two ballots upon which two names appeared, as mentioned in one of the returns.

The several returns of election showed the following result:

First Ward—Andrew J. Walker, 820 votes; C. L. Spencer, 201 votes; W. H. Howe, 96 votes; C. H. Thomas, 1 vote. Second Ward—J. C. Munds, 76 votes; W. E. Springer, 191 votes. Third Ward—Owen Fennell, 268 votes; Washington Catlett, 19 votes. Fourth Ward—H. McL. Green, 95 votes; W. E. Yopp, 189 votes. Fifth Ward—Elijah M. Green, 534 votes; W. E. Mann, 162 votes; C. R. Branch, 84 votes.

The Governor, under the provision of Section Second, of the Act of March, 1897, appointed as Aldermen from each of the respective wards: S. P. Wright, John G. Norwood, B. F. Keith, A. J. Hewlett and D. J. Benson.

On Friday, the 26th of March, 1897, at 9 o'clock a. m., the appellants, S. P. Wright, J. G. Norwood, B. F. Keith, D. J. Benson, A. J. Hewlett, appointees of the Governor, and A. J. Walker and Elijah M. Green, from the first and fifth wards respectively, claiming to be elected Aldermen, took the oath prescribed by law and organized, elected S. P. Wright, Mayor, who then resigned as an Alderman, and H. C. Twining was elected to fill the vacancy caused by Wright's resignation as an Alderman.

On the same morning, the 26th day of March, 1897, at 11 o'clock, the appellants, H. McL. Green, C. L. Spencer, James C. Munds, Washington Catlett, W. E. Mann, together with W. E. Springer, Owen Fennell and W. E. Yopp, all claiming an election as Aldermen at the said alleged election, organized themselves into a Board of Aldermen and elected H. McL. Green as Mayor.

Subsequently thereto, on the next day, Saturday, the 27th day of March, 1897, W. E. Springer, Owen Fennell and W. E. Yopp, who had the day before participated in the organization of the Board that elected Green, Mayor, after notice to A. J. Walker and Elijah M. Green, organized themselves into an alleged Board of Aldermen, there being present Springer, Yopp and Fennell, and elected Walker Taylor as Mayor.

On the 26th day of March, 1897, the appellees, the old Board of Aldermen, held a meeting at which there was a quorum present, and formally resolved and gave notice that they would not deliver possession of the City Government to any of the various persons claiming to have been elected Aldermen at said alleged election.

The first mentioned Mayor and Board of Aldermen, consisting of the Governor's appointees and two Aldermen, claiming their election and appointment as aforesaid, took possession of the City Government.

The appellees, W. N. Harris, as Mayor, and W. C. VonGlahn and others as Aldermen, being the old Mayor and Board of Aldermen, instituted suit against the defendants S. P. Wright and the Board of Aldermen electing him, alleging the unconstitutionality of the Act of March, 1897, and that no election had been held, and demanding possession of the respective offices. Summons was returned to the April Term, 1897, of the Superior Court.

The appellant, H. McL. Green, and certain of the alleged Aldermen who elected him Mayor, likewise instituted a suit against the defendant S. P. Wright and others, upon the grounds set forth in their complaint. Summons was also returnable to the April Term, 1897.

The suits were consolidated at the April Term, 1897, by order of the Court.

His Honor gave judgment for the plaintiffs, holding that the Act entitled "An Act to Amend the Charter of the City of Wilmington," ratified the 5th day of March, 1897, was unconstitutional and that the election for Aldermen of the City of Wilmington held on the 25th day of March, 1897, was invalid and that the old Board of Aldermen and Mayor, who were the plaintiffs, and their associates were entitled to hold their offices until their successors were duly elected and qualified, and that they were entitled to the offices of Mayor and Aldermen of the City of Wilmington.

From this judgment the several sets of appellants appealed to the Supreme Court.

On the pleadings and the facts agreed the contentions of several parties were as follows:

The appellant S. P. Wright, claiming to be Mayor, and J. G. Norwood, B. F. Keith, A. J. Hewlett, D. J. Benson, H. C. Twining, A. J. Walker and Elijah M. Green, claiming to be, with Owen Fennell, W. E. Springer and W. E. Yopp, the Aldermen of said City, contended that the Act ratified the fifth of March, 1897, was constitutional and valid in its entirety, that the election was held under and pursuant to the said Act and was a valid election, and that they were then elected, (with the exception of H. C. Twining,) and having qualified, elected S. P. Wright, Mayor, who resigned thereupon as an Alderman, when they elected the said Twining an Alderman in his (Wright's) place.

The appellants, Walker Taylor, claiming to be Mayor, and W. E. Yopp, Owen Fennell, W. E. Springer, claiming to be, with A. J. Walker and Elijah M. Green, the duly elected Aldermen, contended that the Act of the Legislature ratified the 5th day of March, 1897, was unconstitutional and void, in so far as it conferred power upon the Governor to appoint one Alderman from each ward, but was constitutional and valid in so far as to provide for the election of five Aldermen; that the election was held under the said Act, and that the said W. E. Yopp, Owen Fennell, W. E. Springer, A. J. Walker and Elijah M. Green were duly elected the five Aldermen, and, having qualified, a majority of them, *to-wit:* Yopp, Fennell and Springer, elected the said Walker Taylor, Mayor.

The appellants, H. McL. Green, claiming to be Mayor, and James C. Munds, W. E. Mann, C. L. Spencer and Washington Catlett, claiming to be, with W. E. Yopp, Owen Fennell, W. E. Springer, A. J. Walker and Elijah M. Green, the Aldermen, contended that so much of the Act ratified March 5th, 1897, as devolved upon the Governor the appointment of one Alderman from each ward was null and void, but the remaining portions of the Act are good and valid; that the election was held under the provisions of the Charter of said City and Acts amendatory thereof, in existence before the passage of the Act of March 5th, 1897, and that they, with the said A. J. Walker and Elijah M. Green, were duly elected, and, having qualified, they elected H. McL. Green, Mayor.

The plaintiffs (appellees), W. N. Harriss, claiming to be Mayor, and so adjudged to be by the Court below, and W.

C. VonGlahn, Thos. D. Meares, R. W. Hicks, W. H. Northrop, J. O. Nixon, Thos. J. Gore and D. D. Cameron, claiming to be, and so adjudged to be, with A. J. Walker and W. E. Springer, the legally constituted Mayor and Aldermen of said City, contend, that the Act of March 5th, 1897, is unconstitutional and void in its entirety; that the election was held under and pursuant to said Act and is invalid; that, there being no valid election held, they are entitled, and are in duty bound, to hold the offices of Mayor and Aldermen until their successors are *legally elected and qualified.*

Messrs. George Rountree and *Iredell Meares*, for plaintiffs.
Messrs. Ricaud & Bryan, for defendants (appellants).

FAIRCLOTH, C. J.: The three cases of *Harriss* v. *Wright* and others were, by consent, consolidated and tried as one case. Before this controversy arose, Harriss and others were the Mayor and Board of Aldermen in office; and they insist that they are the rightful owners of their offices, holding over on the ground that there has been no valid appointment or election of any successors. The defendant, Wright, claims the office of Mayor of the city of Wilmington by virtue of the Governor's appointment under the authority of the Act of Assembly of 1897, Chapter 150, ratified March 5, 1897. The defendants, Taylor and Green, severally, with their respective Boards of Aldermen, claim said offices by reason of certain elections held for the said city government. As defendant Wright admits that he has no right to said office unless said Act of Assembly is valid, we will direct our attention first to his contention.

Under our system, it is said that sovereign power resides with the people; and this is true, so far as sovereignty can exist in human affairs. In England we understand that Parliament is the sovereign power of the country. In this country the sovereign people have established national and state constitutions, and these constitutions are the supreme law of the land. They have divided and subdivided the powers of government, with such power in each division or department or branch as they deemed expedient for the good of the public, and local convenience of the citizens. Among these is the legislative branch, invested with a vast field of power, and in fact all legislative power not prohibited by the organic law. These great powers are exercised within legislative discretion, and, although we know by experience that this exercise of power is sometimes abused, yet this seems inseparable from the nature of human institutions. No man or men have yet been able to establish a government capable of accomplishing its legitimate ends, and also incapable of some inconvenience and mischief. In our system a prime object has been to give the people all the rights of persons and things that are consistent with such restraint as are necessary for the public good and general welfare, and among these is the principle of local self-government; and we were impressed by all the parties to this controversy, during the argument, with their avowed devotion to that principle. Prior to 1875 the principle of local self-government was absolutely safe and secure by provisions of the organic law of the State, but during that year a constitutional convention convened, and, for reasons presumably satisfactory to itself, amended article 7 of the constitution, in these words: "Section 14. The General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine and thirteen." Thus was placed at the will and discretion of the Assembly, the political branch of the State government, the election of county officers, the duty of county commissioners, the division of counties into districts, the corporate powers of districts and townships, the election of township officers, the assessment of taxable property, the drawing of money from the county or township treasury, the entry of officers on duty, the appointment of Justices of the Peace, and all charters, ordinances, and provisions relating to municipal corporations. These important subjects were fixed and distinctly settled in the constitution before the adoption of said amendment, and the present controversy is one of the practical results of such change in the constitution. With the motives and wisdom of the adoption of said Section 14, Article 7, this Court has nothing to do.

The Act of 1897, Chapter 150, to amend the charter of the city of Wilmington, provides "that there shall be elected by the qualified voters of each ward one Alderman only, and there shall be appointed by the Governor one Alderman for each ward, and the Board of Aldermen thus constituted shall elect a Mayor according to laws declared to be in force by this Act," and repeals all laws in conflict with this Act. Is that Act constitutional or void? That is the pivotal point in this contention. It seems not to be denied that under Article 7, Section 14, the Legislature may not only "modify, change or abrogate" all the enumerated Sections of said Article, but may "substitute others in their place;" but it is argued that the Act of 1897, Chapter 150, assumes more power than is authorized by Article 7, Section 14. How it exceeds the authority, is not clearly pointed out. There is no limitation on the power in said Section 14, and we have found none elsewhere in the constitution. Constitutions are general in their provisions, and do not enter into details. Certainly, ours has not done so in this instance. It is urged, however, that the exercise of the power now claimed under the Act would infringe upon general principles of law, and would deprive the people, in this particular respect, of the power of local self-government. A brief answer would seem to be, "*Lex ita scripta est.*" What kind of substitute could the Legislature make without subjecting itself to the same objection? Let us suppose that in pursuance of Section 14 the Legislature should "modify and change" Section 12 of Article 7, and insert therein these words: "There shall be elected by the qualified voters of each ward one Alderman only, and there shall be appointed by the Governor one Alderman for each ward." The validity of that substitution would not be questioned. Is it, then, any more efficacious in that form than the same language in the Act under consideration, each provision depending solely upon said Section 14, Article 7, for its vitality? The people, then, by adopting Article 7, Section 14, have clearly invested their representatives in the Legislature with the power in question, to be exercised at their discretion, with which the Court cannot interfere. We had some comment on Article 8, Section 4, as controlling the subject before us. That Section does refer to cities and towns, by its very terms. It requires the Legislature to provide for the organization of cities and towns, and to restrict the power of such cities and towns in the particulars therein enumerated. There is no restraint upon the Legislature, and no conflict with Article 7, Section 14. This Section 4 is an exact copy of Article 8, Section 9, of the constitution of New York. It was held in that State, and several others having the same constitutional provision, that what the restrictions should be upon the enumerated powers, and how they shall be imposed, are subjects left to the discretion of the legislative department, with the exercise of which the Courts cannot interfere. We are led, then, to conclude, upon the language of Section 14, and upon some of the best text writers, and upon the recognition of the principle we are announcing by this Court, that the Act of 1897, Chapter 150, is constitutional and valid. *Mills* v. *Williams,* 33 N. C., 558; *Dare County* v. *Currituck County,* 95 N. C., 189; *Lilly* v. *Taylor,* 88 N. C., 489; *Wood* v. *Town* *of Oxford*, 97 N. C., 227; *McCormac* v. *Commissioners*, 90 N. C., 441; *Brown* v. *Commissioners*, 100 N. C., 92; *Wallace* v. *Trustees*, 84 N. C., 164.

Much of the learning with which we were entertained on the argument refers to the law prior to, and unlike, Article 7, Section 14. Some of the briefs filed draw in question the power of the Legislature to delegate its authority in the premises to the Governor, as is done in the Act we have discussed. This cannot now be seriously disputed in North Carolina. We refer to one case which fully sets that matter at rest, and which has been followed uniformly in other cases and to the same effect. *Thompson* v. *Floyd*, 47 N. C., 313. The Legislature, when not prohibited, acts through agents,—either individuals or corporate bodies. Practically, it could not well discharge its duty without such agencies.

Our opinion is that defendant Wright, and his Board of Aldermen are the rightful owners of the offices in the city government now occupied by them.

Reversed.

CLARK, J. (concurring): I concur in the result, but not in some of the views expressed in the opinion. Under the amended constitution of 1875, the Legislature felt empowered to elect the magistrates for each county, and to intrust them with the duty of electing the County Commissioners, and this was acted on for nearly two decades. It follows that they might have intrusted to such magistrates the duty of choosing Town Commissioners as well as County Commissioners, or have selected and empowered the Governor, or other agency, instead of the magistrates, to appoint the Commissioners of Towns and Counties. This is a broad duty to be intrusted to the Legislature, yet the constitution of 1875 clearly gave the Legislature unrestricted powers in such matters. I am, therefore, of opinion that the Act empowering the Governor to appoint a portion of the Town

Commissioners of Wilmington was within the scope of the powers intrusted to their discretion by the constitution. Whether it is more the subject of criticism that the constitutional convention of 1875 saw fit to intrust to the Legislature powers over local government, vast, but justifiable, in their opinion, from conditions well known and thoroughly considered, and which were ratified by submission to the ballot box, or that a Legislature which deemed that such powers were no longer necessary as to county magistrates and Commissioners, should adopt the system for the first time as to one or two municipalities,—this is for consideration in other forums. It is not for us to criticise, but to construe what has been enacted by constitutional conventions, or, within their powers, by Legislative assemblies.

MONTGOMERY, J. (concurring): I concur in the opinion of the Court that the defendants are entitled to hold the offices they are now in the possession of. In this forum, however, I do not wish to be considered as passing any criticism either upon the action of the convention of 1875, or that of the General Assembly of 1897, in its enactment of the law which has been considered by the Court in this case.

J. A. FLEMING, et. al. v. D. C. McPHAIL, et. al.

Practice—Appeal—Case on Appeal—Failure to Print Exhibit.

Where an appellant fails to have printed as a part of the record on appeal an exhibit which was made, by the Judge or by agreement of counsel, a part of the case on appeal, the appeal will be dismissed.

CIVIL ACTION tried before *McIver, J.*, at Spring Term, 1897, of SAMPSON Superior Court. The plaintiffs appealed from a judgment rendered for the defendants who moved in this Court to dismiss the appeal for appellants' failure to print an "exhibit" which was made a part of the case on appeal.

Messrs. F. R. Cooper and *F. P. Jones*, for plaintiffs (appellants).

Messrs. J. L. Stewart, Allen & Dortch and *Jones & Boykin*, for defendants.

CLARK, J.: If exception from the practice regulating appeals is made in one case as a favor, every other appellant has the right to argue that he also should be excepted, if negligent. The consequence will be that the time of the appellate Court which, as far as possible, should be devoted exclusively to hearing appeals upon their merits, will be largely taken up with the discussion of mere questions of practice raised by those who, having from indifference or negligence disregarded the regulations which govern the procedure as to appeals, conceive each that his cause should be made an exception to the rules. It is necessary to have some rules of procedure as to appeals, and those prescribed by statute and by this Court are very few and very plain. The only way to avoid a great and useless loss of time is for appellants to obey and for the Court impartially and rigidly to observe them so that an appellant who fails to do so may not take up time in asking to be made an exception.

The rule as to printing the necessary portions of the record was made for the benefit of litigants and to expedite business, and the necessity for adhering to it has been often stated by the Court. *Horton* v. *Green*, 104 N. C., 400; *Hunt* v. *Railroad*, 107 N. C., 447; *Barnes* v. *Crawford*, 119 N. C., 127. Printing the judgment and the issues was at first left to depend upon whether they were material, but so many arguments arose as to whether they were essential and so much time was lost in this way which should have been devoted to hearing the merits of causes, (*Wiley* v. *Mining Co.*, 117 N. C., 489) that the rule was changed (117 N. C., 869) so as to require the judgment and issues to be printed in all cases. *Thurber* v. *Loan Association*, 118 N. C., 129. As to the "case on appeal," that is always required to be printed in full. When an "exhibit" is made by the Judge or by agreement of counsel a "part of the case on appeal" it must be printed since thereby it has been declared material. To go behind such order of the Judge or such agreement of counsel and to discuss whether such exhibit was, notwithstanding, material or not would be to require the Court to go into the merits of the case to consider this purely incidental matter. It would be a needless consumption of time which can be devoted to better purposes than detaining counsel here in other causes till the court can gravely determine whether a party who wished to save the petty expense of printing a part of the case on appeal, which the Judge or his own agreement had held material enough to be embraced in the case on appeal, ought to have printed it or not. The Court has heretofore declared that it will not delay the hearing of other causes to hear such debate. *Barnes* v. *Crawford*, *supra*, in which it was said: "Our rules designate the parts of the record to be printed. We cannot accept printing parts of such parts, at the option of the appellant, as a compliance."

The "case on appeal" including everything ordered, or agreed, to be "made a part" thereof is required to be printed. Here, "exhibit "A" was made a part of the case on appeal by the parties themselves who settled the case upon agreement. The appellant's counsel afterwards chose to regard exhibit "A" as immaterial and did not print it. The appellee's counsel asserts that it is material to the hearing of the appeal. To decide between them, we would have to go through the case. Both parties assented to its being material by putting it in as a part of the "case on appeal". Not having printed it, the appellant has not complied with the requirements, long prescribed and uniformly observed by the Court as necessary, for the proper dispatch of business here, and the motion to dismiss for such non-compliance must be granted.

Appeal dismissed.

A. F. BIZZELL and Wife v. M. M. McKINNON.

Contract—Trustee of Naked Trust—Husband and Wife—Evidence—Trial.

1. Where, in the trial of an action for the recovery of damages for breach of contract to do certain work and place certain improvements upon land alleged to belong to the plaintiffs, the defendant having admitted in his answer that the plaintiffs were owners of the property in fee, the widow of the plaintiff husband (who had died pending the action) introduced a deed showing that the husband was a mere naked trustee for her benefit, without limitation over or duties to perform; *Held*, that the introduction of such deed as evidence could not prejudice the defendant and was relevant as showing that by the death of the husband the surviving plaintiff became entitled to the whole amount of recovery.
2. Neither the trustee of a naked legal trust without the consent of the *cestui que trust*, nor the husband, without the consent of the wife, having the right to compromise or yield a right already accrued of the *cestui que* trust or wife, a letter from the deceased husband of the surviving plaintiff in an action for damages for breach of a contract in relation to improvements on land held by the husband in trust for the wife, which was offered to show satisfaction of the contract, was properly rejected.
3. In the trial of an action commenced by husband and wife and continued by the wife after the death of the former, for breach of a contract in relation to work and improvements which the defendant had agreed

to perform and make upon land held by the husband in trust for his wife, the trust being a purely naked and legal one without limitation over or duties to be performed by the trustee, testimony of the defendant concerning conversations or transactions with the husband in reference to the contract and its satisfaction was properly excluded, not only as being in violation of Section 590 of the *Code* but for the better reason that defendant could not be heard to show that the rights of the wife and *cestui que* trust had been yielded or compromised by her husband and trustee, and on the further ground that there was no evidence that the husband was the agent of the wife in the transaction.

CIVIL ACTION for the recovery of damages for breach of contract tried before *McIver, J.*, and a jury at September Term, 1897, of RICHMOND Superior Court. There was verdict and judgment for the plaintiff and defendant appealed.

Messrs. W. H. McNeill and *Frank McNeill*, for plaintiff.
Mr. John D. Shaw, for defendant (appellant).

MONTGOMERY, J.: This action was brought to recover damages for an alleged breach, on the part of the defendant, of a contract in which he had agreed to do certain work and to put certain improvements upon a tract of land which was alleged in the complaint and admitted in the answer to be owned in fee by the plaintiffs who were husband and wife. The plaintiff husband died during the pendency of the suit and before the trial. The surviving plaintiff introduced a deed to the land described in the complaint from J. T. Roper to the deceased husband in which the property was conveyed to be held in trust for the sole and separate use, benefit and behoof of his wife and her heirs, discharged from any debt, obligation or contract of the husband. The husband was simply a trustee for his wife without limitation over, or duties to be performed. The defendant objected to the introduction of the deed because of its alleged irrelevancy; first, because the complaint alleged the title to the property to be in the plaintiffs, in fee, and the answer admitted it, and therefore the title was not in issue; and second, because it tended to contradict the complaint. The counsel of the defendant, here, cited as an authority to sustain his position the case of *Sams* v. *Price*, 119 N. C., 572. In that case the plaintiff in his complaint declared on a contract made directly with the defendants. On the trial he undertook to show that in a contract between the defendants and another person the defendants had agreed with that other person, and without the knowledge or consent of the plaintiff, to pay to the plaintiff the amount claimed in plaintiff's complaint. The testimony was admitted in the Court below but this Court held that that was error, for the reason that the testimony, which his Honor allowed to be received, tended to prove a different contract and an entirely different cause of action from the one set out in the complaint.

But in the case before us the title to the land was not in issue; neither was the making of the contract as set out in the complaint, for the contract was admitted in the answer. The only question at issue was whether the contract had been satisfied by the defendant. The deed introduced on the trial and the complaint were not contradictory. There was conveyed in the deed the legal title to the plaintiff husband, while the whole equitable estate vested in the wife; in that sense then the plaintiffs were at the time of the filing of the complaint the owners of the property in fee. After the deed was offered in evidence it became apparent to his Honor that whatever interest the deceased plaintiff and husband might have had in the land was determined at his death, and that the wife was the real owner of the property and was entitled to the whole of any recovery that might be had in the action; and he properly allowed it to be read in evidence. The admission of the deed put the defendant under no disadvantage whatsoever. If the plaintiffs had alleged in the complaint that the wife was the owner of the land and the husband the simple trustee of the wife, and the defendant had answered that the contract was made with the trustee and husband and that the wife assented to it, he would have had still to show that she agreed to the satisfaction of the contract as set up in the defendant's sworn answer; and the letter which the defendant introduced from the plaintiff husband, tending to show that he had adjusted and satisfied the contract with the defendant, could not be allowed in evidence to prove acquiescence and consent on her part. Neither the trustee of a naked legal trust without the consent of the *cestui que* trust, nor the husband without the assent of the wife, would have the right to compromise or yield a right already accrued of the *cestui que* trust or wife. *Towles* v. *Fisher*, 77 N. C., 437. If it could be said that the trial in this case was not strictly regular in all its stages yet, upon a careful review, we are satisfied that no error has been committed which is in the least prejudicial to the defendant's interest, and, as his Honor's course saved time and expense and worked out substantial justice, the verdict and judgment must stand.

The conclusion at which we have arrived upon the question of the admissibility in evidence of the deed makes it unnecessary for us to discuss the remaining exception of defendant, except the two in reference to the offer of the defendant to show by himself conversations and transactions with the deceased plaintiff and husband in reference to the contract and its satisfaction. The plaintiff 's objection to this proffered testimony was sustained on the ground that it was in violation of Section 590 of *The Code.* His Honor was right in refusing the testimony, but we think the true ground was that the conversation or transaction between the defendant and the deceased plaintiff, he being the trustee of the wife and the trust being a purely naked and legal one without limitation over and without duties to be performed by the trustee, could not be heard to show that the rights of his *cestui que* trust had been yielded or compromised, and on the further ground that the defendant did not offer to show that the husband was the agent of the wife in the transaction.

There is no error.

J. C McCASKILL, Administrator of Elizabeth Graham, deceased, v. J. P. GRAHAM

Judgment in Personam—Judgment in Rem—Foreclosure of Mortgage—Lien of Judgment—Right of Administrator to Sell Land Conveyed by Intestate Subject to Judgment Lien.

1. An administrator has no right to sell land of his intestate for assets which, subject to the lien of a judgment, had been conveyed by the intestate, unless such conveyance had been made to defraud creditors.
2. A judgment upon a note *in personam*, taken at the same time with a decree of foreclosure of a mortgage (or judgment in *rem*), is final and creates a lien upon all the property of the judgment debtor in the county where docketed and the validity of the judgment on the debt is not affected by the judgment for sale of the land.
3. Where one buys land subject to a judgment lien his title is freed from the incumbrance after the lapse of ten years from the date of docketing.

Civil action to sell land for assets tried before *Coble, J.*, at Fall Term, 1897, of Robeson Superior Court. From a judgment for the plaintiff the defendant appealed.

Messrs. McNeill & McLean, for defendants (appellants).
No counsel, *contra.*

Furches, J.: Elizabeth Graham owed the plaintiff a debt, and to secure the payment of the same she gave him a mortgage on a part of her land. Upon this debt and to foreclose this mortgage, the plaintiff brought an action and at Spring Term, 1887, of Robeson Superior Court, recovered a judgment against the said Elizabeth for $754.93 and also judgment of foreclosure. After this judgment was docketed in Robeson County, Elizabeth sold and conveyed the lands in controversy to the defendant J. P. Graham. This land was not included in the mortgage. After this sale and conveyance, and in 1888, the said Elizabeth died and the plaintiff has been appointed and qualified as her administrator. And this proceeding is brought before the Clerk of the Superior Court to sell this land for assets to pay debts, in which the plaintiff claims that his judgment was a lien on this land at the time it was sold to the defendant, and he seeks to follow the land and to enforce this lien.

Treating the plaintiff's judgment simply as a debt and Elizabeth having sold the land before her death, the plaintiff has no right to sell it for assets, unless he alleges and shows that the sale was made to defraud creditors, and this he does not allege. *Code,* Section 1446; *Heck* v. *Williams,* 79 N. C., 437; *Paschal* v. *Harris,* 74 N. C., 335.

The plaintiff's judgment having been docketed before the death of Elizabeth and before the date of defendant's deed, it created a lien on this land, if it was a final judgment. The defendant contends that it was not a final judgment and created no lien; that it was an equitable action to foreclose a mortgage, and the judgment was only interlocutory. In this defendant is mistaken. It was an action in *personam* on the note, and in *rem* upon the mortgage, which is allowable under our *Code* practice. *Ellis* v. *Hussey,* 66 N. C., 501. The judgment for $754.93 was a personal judgment and was final. The judgment foreclosing the mortgage was the exercise of the equitable jurisdiction of the Court, and was not what would have been a final decree in equity, and was not so in this case. But the final judgment on the note, which would have been the judgment at law under the old practice, was final and not affected by the equitable judgment of foreclosure. Under the old practice before *The Code*, these would have been separate judgments, in separate Courts, and the taking of one would not have affected the validity of the other. And although they are now both in the same Court and in the same action, that does not change the principles which govern them, nor does it affect their validity. We must therefore hold that plaintiff's judgment was a lien on the land in controversy, when docketed.

But it has been more than ten years since the taking and docketing of this judgment. And the plaintiff's lien expired at the end of ten years from the date of docketing. And the defendant having bought from Elizabeth (the defendant in plaintiff's judgment) his title became freed of the incumbrance of the lien of plaintiff's judgment, at the end of ten years from the docketing, *Spicer* v. *Gambill*, 93 N. C., 378, —this proceeding being executionary in its nature.

There is error and the judgment below is reversed.

Reversed.

J. C. McCASKILL v. J. M McKINNON and Wife.

Judgment—Final Judgment—Decree of Foreclosure of Mortgage —Statute of Limitations.

1. A judgment for a debt including an order for the sale of land mortgaged to secure the same, is final as to the debt at the time when rendered and not at the time when the decree confirming the sale is made.

2. Where, in an action to recover the amount due on a note and to foreclose the mortgage securing the same, judgment was rendered on the debt at September Term, 1886, of a Superior Court and in the judgment an order was made directing the sale of the land which sale was reported to and confirmed at June Term, 1887, of the Court and the proceeds were credited on the judgment at the latter date: *Held*, that the Statute of Limitations began to run at the date of the

money judgment in September, 1886, and not from the date of the confirmation of the sale.

3. A payment on a judgment does not arrest the running of the Statute of Limitations.

4. An appeal from the judgment of a Clerk of the Superior Court refusing leave to issue execution on a judgment may be heard by the resident or presiding Judge of the District at Chambers in another County.

This was a motion by plaintiff under Section 440 of *The Code* for leave to issue execution, heard before *Coble, J.*, at Chambers, on appeal from a judgment of the Clerk of the Superior Court of Richmond County.

The action was brought to Fall (September) Term, 1886, of the Superior Court of Richmond County, N. C., the Summons in which was served September 3rd, 1886. At said Fall (September) Term, 1886, the complaint was filed, from which it appears that the action was brought to recover from defendants an indebtedness of $3,000.00 and interest due by their joint note, secured by mortgage deed executed by defendants to the plaintiff. The defendants having failed to answer within the time prescribed by law, judgment was rendered against them and in favor of the plaintiff for the amount of said indebtedness as alleged in the complaint at said Fall (September) Term, 1886, of said Court, by Judge J. A. Gilmer. And it was ordered in the said judgment that in the event the said indebtedness was not paid within a time certain fixed by the Court, the land named in said mortgage deed should be sold to satisfy same. A Commissioner was appointed by the Court with directions to report to the next Term, and in the same judgment it was ordered that "this cause be retained for further directions." Default having been made in the payment of said indebtedness so ascertained by the Court, the land was sold by the Commissioner on the 4th day of April, 1887, who made his report of sale to June Term, 1887, at which said

June Term, 1887, final judgment was rendered by Walter Clark, Judge Presiding, approving and confirming all that had been done in the cause. Both judgments were duly docketed and indexed. The first and only execution issued on this judgment by J. A. Gilmer, Judge, Fall Term, 1886, is dated 21st July, 1887. The case appeared regularly on the Civil Issue Docket until June Term, 1887, when there was final judgment, and since then disappeared from the docket. This motion for leave to issue execution was instituted and served 15th day of February, 1897. The balance due on said judgment is still unsatisfied and due plaintiff. The defendant, John M. McKinnon, died insolvent, pending this appeal in Supreme Court, and plaintiff elects to proceed only against the co-defendant, M. E. McKinnon.

The Clerk denied the motion and plaintiff appealed to the Judge who sustained the judgment of the Clerk and plaintiff appealed.

Mr. J. F. Payne, for plaintiff (appellant).

Mr. W. H. Neal, for defendant.

Clark, J.: Judgment was rendered at September Term, 1886, in favor of the plaintiff against the defendant to recover the sum of $3,000 and interest and decreeing the foreclosure of the mortgage which had been executed to secure the debt. At June Term, 1887, the Commissioner appointed under the decree of foreclosure made his report which was confirmed and he was directed to credit the aforesaid judgment with the sum of $1,500 realized at the foreclosure sale and to make title to the purchaser.

This was a motion under Section 440 of *The Code* for leave to issue execution, made before the Clerk of Richmond County on the 15th of February, 1897, and heard on appeal by the Judge at Chambers in Carthage, Moore County.

The plaintiff contends that the judgment at September

Term, 1886, was interlocutory only, and that there was no final judgment till June Term, 1897, and hence that he is not barred by the Statute of Limitations, *Code*, Section 152, (1). But the judgment at Fall Term, 1886, was final as to adjudging the recovery of money, and it is only for the recovery of the unpaid part of the sum therein adjudged that execution is moved for. The judgment of September, 1886, was "retained for further directions" and interlocutory only as to the foreclosure, and upon the final judgment rendered as to that at June Term, 1897, no execution is now asked, or indeed could be asked. It was the conclusion of that matter and left nothing which could be done by an execution, if issued now. An action on the judgment would be barred (*McDonald* v. *Dickson*, 85 N. C., 248) but notwithstanding the lien of the judgment has ceased, a motion to issue execution thereon would not be barred if execution had been regularly issued once in every period of three years. *Williams* v. *Mullis*, 87 N. C., 159. But here the record shows that no execution had issued since July, 1887. *Lytle* v. *Lytle*, 94 N. C., 683.

The payment entered upon the judgment at June Term, 1887, did not arrest the running of the Statute. *McDonald* v. *Dickson*, 87 N. C., 404; *Hughes* v. *Boone*, 114 N. C. 54.

The appeal from the Clerk could be heard at Chambers in another County. *Ledbetter* v. *Pinner*, 120 N. C., 455.

Affirmed.

A. W. HAMER v. L. C. MCCALL.

Landlord and Tenant—Estoppel—Landlord's Lien—Personal Property Exemption.

A tenant being estopped from denying that the party from whom he leased is his landlord and entitled to the rents, cannot escape the landlord's lien by claiming his personal property exemption out of the crops.

CIVIL ACTION tried before *McIver, J.*, and a jury at Fall Term, 1897, of RICHMOND Superior Court. There was a verdict with judgment thereon for the plaintiff and defendant appealed.

Mr. Walter H. Neal, for plaintiff.

Mr. John D. Shaw, Jr., for defendant (appellant).

FURCHES, J.: The plaintiff rented a farm, a mule and farming implements to the defendant for the year 1895. The rents not being paid, as plaintiff alleged, he brought this action for the unpaid rents, in which he claimed a landlord's lien upon the defendant's crop raised on the land so rented to the defendant.

The defendant answered and denied that he owed the plaintiff anything, and alleged that the farm, the mule and the implements, so rented, belonged to the plaintiff's wife; that she is dead, having died in August, 1895, and that there has been no administration on her estate; sets up a counter-claim; denies that plaintiff is entitled to a lien on his crop, even if it is found that he owes him anything on the rent, and claims the crop as a personal property exemption.

The jury find that there is $23.93 still due on the rents, and while there are other exceptions taken in the record it seems to us that they depend upon the plaintiff's right to claim these rents as landlord. Upon the death of the wife, these rents became a part of the wife's personal estate, and the legal title could only pass to the plaintiff as her administrator. *Nicholson* v. *Commissioners*, 119 N. C., 20; 118 N. C., 38.

But defendant having leased this land and other property from the plaintiff became his tenant, and as between them he is estopped to deny that the plaintiff is his landlord and entitled to the rents. The plaintiff being the landlord and the defendant his tenant, it must follow that the law of landlord and tenant applies, and the plaintiff acquired a lien on the crops for the payment of the rents. The plaintiff having a lien on the crop for the payment of the rents, the defendant was not entitled to have his personal property exemption out of the crops until the rents were paid. The judgment of the Court below is

Affirmed.

A. W. HAMER v. L. C. McCALL.

Practice—Motion in Superior Court to set aside Magistrate's Execution and Order of Sale—Jurisdiction.

The Superior Court has no jurisdiction of an original motion to set aside an execution and order of sale granted by a Justice of the Peace.

The plaintiff obtained a judgment before a Justice of the Peace against the defendant, as his tenant, for rents and advances. The defendant appealed to the Superior Court but, having given no bond to stay execution, the Justice of the Peace issued execution and an order for the sale of the crops and other personal property subject to plaintiff's lien as landlord. At February Term, 1897, of RICHMOND Superior Court, before *Coble, J.*, the defendant made a motion to set aside the execution and order of sale and to require the

Sheriff to pay over to him the fund in his hands arising from such sale. The motion was denied and defendant appealed.

Mr. Walter H. Neal, for plaintiff.
Mr. John D. Shaw, Jr., for defendant (appellant).

FURCHES, J.: The merits of this action are discussed and determined in the above appeal by defendant in the same case.

This appeal, as we understand it, is from the judgment of the Superior Court refusing defendant's motion to set aside and vacate an execution and order of sale made by the justice of the peace who tried the case. This is an original motion made in the Superior Court for the first time. The Court had no jurisdiction and the motion was properly refused. *Bailey* v. *Hester*, 101 N. C., 538; *Berdsey* v. *Harris*, 68 N. C., 93.

Affirmed.

STATE on relation of L. P. CROMARTIE v. C. P. PARKER, Z. G. THOMPSON, W. K. ANDERS and C. W. LYON.

Quo Warranto—Practice—Misjoinder of Causes of Action—Misjoinder of Parties—Community of Interests—Division of Action.

1. A complaint setting up separate causes of action against several parties, among whom there is no community of interests, is demurrable on the ground of misjoinder of causes of action and of parties.
2. The complaint in an action in the nature of *quo warranto* against several members of a Board of County Commissioners, alleging that the defendants held their offices by different tenures, from different sources and had forfeited them by different acts, is demurrable on the ground of a misjoinder of distinct causes of action, the action being directed not at the power or authority of the Board to act as

such but at the separate right of each individual defendant to remain a member of the Board.

3. Where there is not only a misjoinder of distinct causes of action but also a misjoinder of parties having no community of interests, the action cannot be divided under Section 272 of *The Code* which permits division only when the causes alone are distinct.

CIVIL ACTION in the nature of *quo warranto*, heard before *McIver, J.*, at Fall Term, 1897, of BLADEN Superior Court, on complaint and demurrer.

The complaint was as follows:

"1. The plaintiff complains and alleges that he is a resident citizen, property-owner and tax payer of the County of Bladen, and as such has an interest in having the offices of said county lawfully filled.

2. That he has filed bond and obtained leave of the Attorney-General of the State to bring this proceeding in accordance with the statutory requirements.

3. That on Tuesday, after the first Monday in November, 1896, at an election duly held in the County of Bladen, State of North Carolina, pursuant to the statute for the election, among other officers, of three County Commissioners for Bladen county for the term of two years from the first Monday in December, 1896, the said defendants, Z. G. Thompson and W. K. Anders, received a majority of the legal votes for the said office of County Commissioners and were duly elected.

4. That on the 11th day of November, 1896, at Chambers in Carthage, N. C., his Honor, James D. McIver, resident Judge of the Seventh Judicial District of North Carolina, which district includes the county of Bladen, appointed the defendants, C. P. Parker and C. W. Lyon, additional Commissioners for the county of Bladen, pursuant to Section 5, Chapter 135, Laws of 1895, the order of their appointment being duly recorded in order and decree docket of the Superior Court of Bladen county on page 150.

5. On the first Monday in December, 1896, said defendants, duly qualified as County Commissioners of Bladen county by taking the oath of office and being duly inducted into said office of County Commissioners and are now holding, exercising and performing the duties, powers and functions of said office.

6. That on the first Monday in June, 1897, being the seventh day thereof, the defendants, Z. G. Thompson, C. W. Lyon and one John Fred Croom proceeded to elect and did elect themselves members of the Board of Education for the county of Bladen.

7. That on the first Monday in July, 1897, being the fifth day thereof, the said John Fred Croom having refused to qualify, the said defendants proceeded to elect and did elect the defendant, W. K. Anders, a member of the Board of Education for the county of Bladen.

8. That on the first Monday in July, 1897, being the fifth day thereof, the defendants, Z. G. Thompson, C. W. Lyon and W. K. Anders duly qualified as members of the Board of Education of Bladen county by taking the oath of office and assuming the duties, powers and functions thereof and are now holding, exercising and performing the duties, powers and functions thereof.

9. That since the said fifth day of July, 1897, the said defendants, Z. G. Thompson, C. W. Lyon and W. K. Anders have continued to hold two offices or places of trust or profit under the State of North Carolina and to exercise and perform the duties, functions and powers thereof contrary to Section 7 of Article 14 of the Constitution of North Carolina.

10. That said Section 5 of Chapter 135 of the Acts of the General Assembly of 1895 was repealed by Section 1 of Chapter 366 of the Acts of the General Assembly of 1897, thereby abolishing the office of additional Commissioners for the counties which had applied for and obtained the appointment of the same.

11. That the said C. P. Parker continues to hold the said office of County Commissioner and exercise and perform the powers, duties and functions thereof, although said office was abolished by Section 1 of Chapter 366 of the Acts of the General Assembly of 1897.

12. That said defendants now unlawfully hold and exercise the functions, duties and powers of said office of County Commissioners which were vacated and abolished by the repeal of Section 5 of Chapter 135 of the Acts of the General Assembly of 1895 and which was vacated and forfeited by said defendants, Thompson, Lyon and Anders when they accepted and duly qualified and were inducted into the second office, that of member of the Board of Education for Bladen county in controvention of Section 7 of Article 14 of the Constitution of this State, that no person who holds any office or place of trust or profit under this State shall hold or exercise any other office of trust or profit under the authority of this State.

13. That said defendants have been requested to vacate said office of County Commissioners, but they declined to do so and persist in unlawfully holding and exercising the duties, powers and functions thereof.

14. That said proceeding is brought in the interest of the people of the State to prevent the unlawful holding and exercising the duties, functions and powers of said office of County Commissioner by said defendants contrary to the Constitution of the State of North Carolina.

15. That the offices of County Commissioner and member of the Board of Education are both offices of trust and profit under the State of North Carolina, created and held under the Acts of the General Assembly of this State. Wherefore the plaintiff prays judgment; that the defendants are not entitled to hold the office of County Commissioner, and that they be ousted and removed therefrom; for the cost

of this action; for such other and further relief as may be just and proper."

The demurrer was as follows:

"1. That the complaint does not state facts sufficient to constitute a cause of action; in that, according to the facts as stated, the defendants are rightfully holding the offices of County Commissioners of Bladen county, and properly exercising the duties thereof.

2. That there is an improper joinder of actions, as each of the defendants holds an office as a member of the Board of Commissioners, independent and separate from the office of other members of said Board, and an action cannot be brought against several persons to try the right to different offices.

3. That it appears from the complaint that the defendants, C. W. Lyon, W. K. Anders and Z. T. Thompson accepted the places of members of the Board of Education of Bladen county after they had been duly elected and qualified as members of the Board of Commissioners of said county, and while they were holding said offices.

4. That the office of Board of Education is not an office in contemplation of Article 14, Section 7, of the Constitution of North Carolina, but is one of the offices designated in the proviso to said Section, viz: a Commissioner for special purposes.

5. That it appears from the complaint, and the Article of the Constitution therein cited, that if the office of Board of Education is incompatible with the office of County Commissioner, the office of County Commissioner is not forfeited by accepting the office of Board of Education, but that holding the office of County Commissioner they could not accept or hold any other office."

The demurrer was sustained and plaintiff appealed.

Messrs. R. S. White and *N. A. Sinclair*, for plaintiff (appellant).

Mr. C. C. Lyon, for defendant.

DOUGLAS, J.: This is an action in the nature of *quo warranto* against the defendants to oust them from their offices as County Commissioners of the county of Bladen. The complaint alleged that the defendants, Thompson and Anders, had been duly elected as such Commissioners, but had forfeited said offices by their acceptance of the office of members of the Board of Education; that the defendants, Parker and Lyon, were appointed additional Commissioners under the provisions of Section 5, Chapter 135 of the Laws of 1895, and lost all right to said offices by the repeal of said Section by Chapter 366 of the Laws of 1897; and that the defendant Lyon, in addition to having lost said office of Commissioner by the repeal of said Section, forfeited it by accepting the office of member of the Board of Education. It is alleged that the defendants not only accepted membership on the latter Board, but elected themselves thereto by their votes as County Commissioners.

It will thus be seen that the defendants held the offices from which they are sought to be ousted by different tenures and from different sources, were elected and appointed thereto at different times and forfeited their offices, if they are forfeited, by *different* acts.

The acceptance of another office by one Commissioner could not affect the tenure of any other Commissioner. The defendants demurred, among other grounds, for "That there is an improper joinder of actions, as each of the defendants holds an office as a member of the Board of Commissioners, independent and separate from the office of other members of said Board, and an action cannot be brought against several persons to try the right to different offices." The demurrer was properly sustained. Section 267 of *The Code* specifies what causes of action may be joined, and expressly states that "the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action." *Land Co.* v. *Beatty*, 69 N. C., 329; *Logan* v. *Wallis*, 76 N. C., 416; *Street* v. *Tuck*, 84 N. C., 605; *Doughty* v. *Railroad*, 78 N. C., 22; *Hodges* v. *Railroad*, 105 N. C., 170.

The action at bar comes within none of the enabling clauses of that Section. There is no community of interests between the defendants. The acceptance of another office by one would in no way affect the right of any of the others, as no two are claiming the same office. The action does not go to the power or authority of the Board to act in any way as a Board, but to the separate right of each individual defendant to remain a member of that Board. The right of the defendant Parker cannot depend upon the acceptance of additional offices by the three other defendants, as he has accepted no such office; while the fact that he obtained his appointment from the Judge had nothing whatever to do with the tenure of those elected by the people.

As in this case there is not only a misjoinder of distinct causes of action, but also a misjoinder of parties having no community of interests, the action cannot be divided under Section 272 of *The Code*, which permits division only where the causes alone are distinct. *Mitchell* v. *Mitchell*, 96 N. C., 14. As this action cannot be maintained as now constituted, and cannot be divided, we do not see how the plaintiff could be benefitted by leave to amend, even if granted. The judgment below is affirmed.

Affirmed.

JOHN CULBRETH v. W. H. DOWNING.

Action for Damages—Trespass—Statute Changing Remedy—Limitation, Statute of—Reasonable Time in which to Bring Action.

1. The Legislature may change the remedy and the Statute of Limitations which applies to the remedy, by extending or shortening the time for beginning an action; provided, in the latter case, a reasonable time is given for the commencement of the action before the Statute works a bar.
2. The "reasonable time" for beginning an action on a cause, the statutory limitation of which has been shortened by the Legislature, is held to be "the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute."

CIVIL ACTION for damages for ponding water on land, tried before *Coble, J.*, at April Term, 1897, of CUMBERLAND Superior Court. On the trial his Honor intimated that the action was barred and plaintiff submitted to a non-suit and appealed.

Messrs. J. C. & S. H. MacRae, for (appellant).
Mr. N. W. Ray, for defendant.

FAIRCLOTH, C. J.: This action was instituted to recover damages for ponding water on plaintiff's land by reason of obstruction in a ditch running through defendant's land, which ditch had for a long time carried off such water. It was admitted that the obstructions were in the ditch in March, 1892. On March 8, 1895, the Legislature enacted Act 1895, Chapter 165, that *The Code*, Sec. 155(3) be amended by adding, "And when the trespass is a continuing one, such action shall be commenced within three years from the original trespass, and not thereafter." His Honor intimated that the action was barred and the plaintiff submitted to a non-suit and appealed.

For the purposes of this case the original trespass was in

March, 1892, and at the passage of said Act of 1895, Chapter 165, on March 8, 1895, three years from the trespass in March, 1892, had, within a few days, expired. Prior to the passage of said Act, in such cases, the lapse of 20 years was necessary to bar the action, when the presumption of a grant would arise. *Parker* v. *Railroad*, 119 N. C., 677.

The Legislature may change the remedy and the Statute of Limitations, which applies to the remedy, by extending or shortening the time, provided in the latter case a reasonable time is given for the commencement of an action before the Statute works a bar. *Nichols* v. *Railroad*, 120 N. C., 495; *Terry* v. *Anderson*, 95 U. S. Rep., 628.

This is the extent to which this Court has heretofore gone, and any more rigid rule would seem to be unconstitutional. This rule leaves open the question in each case, what is a *reasonable time*, and that is objectionable because it is attended with uncertainty in the minds of litigants and the profession.

We therefore hold that a reasonable time shall be the balance of the time unexpired according to the law as it stood when the amending Act is passed, provided it shall never exceed the time allowed by the new Statute. For example, if the action would have been barred in six years, and four years have elapsed before the amending Act, then two years more would be a reasonable time. If three years time would bar the action and the three years have elapsed, as in the present case, before the amending Act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions.

This rule is reasonable and just, as neither party will be deprived of such remedy as he had when the cause of action arose, and neither should take any advantage by the amending Act. The plaintiff then can maintain this action, which commenced at April Term, 1896. Error.

JOHN HATWOOD v. THE TOWN OF FAYETTEVILLE.

Action to Recover Taxes Unlawfully Collected—Invalid Tax—Tax Paid Through Mistake—Demand for Repayment—Statute of Limitations.

1. The provision in Section 84, Chapter 137, Acts of 1887, requiring demand for the repayment of invalid taxes to be made within thirty days after payment is mandatory.
2. An action begun in July, 1894, for the recovery of invalid taxes paid in 1890 and several years previous, is barred by *The Code*, Section 155
3. Where taxes are repaid under a mistake of fact, demand for repayment must be made within thirty days after the mistake is discovered. (Acts 1887, Chapter 137, Section 84.)

CIVIL ACTION for the recovery of taxes paid by plaintiff under a mistake of fact, commenced in a Court of a Justice of the Peace and tried on appeal before *Coble, J.*, and a jury, at May Term, 1897, of CUMBERLAND Superior Court. There was a verdict for the defendant and from the judgment thereon the plaintiff appealed.

Messrs. C. W. Broadfoot and *S. H. McRae,* for plaintiff, (appellant,)

Mr. H. McD. Robinson, for defendant.

FAIRCLOTH, C. J.: This action was instituted on July 16, 1894, to recover taxes paid to the town of Fayetteville, annually, from 1873 to 1890, inclusive of the latter year. The allegation is that said taxes were invalid by reason of plaintiff's property being outside of the town limits, and that he paid said taxes under a mistake as to the latter fact. The payment of the taxes and said mistake are admitted, but the defendant's liability is denied. The defendant pleads the Act of Limitations in such actions as the present and avers other matters raising very important questions.

The Act of 1887, Chapter 137, Section 84, declares that any person, claiming that the tax levied is for any reason invalid, after paying the same, may, at any time within thirty days after such payment, demand the same from the authorities for whose benefit it was levied, and if the same be not refunded within ninety days he may sue for the amount. The defendant also relies on the three years limitations on actions. *Code*, Section 155. The plaintiff discovered the mistake of fact in 1892. By operation of the above statute it is plain that the plaintiff's right of action for the alleged cause is barred. In *Railroad* v. *Reidsville*, 109 N. C., 494, it was held that the provision in the Act of 1887, Chapter 137, Section 84, requiring demand to be made within thirty days, is mandatory, and that no action can be maintained without making the demand within the prescribed time, and that such requirement extends to all taxes.

We are unable to see from the record before us when the plaintiff's demand was made. If it was just prior to commencing his action, that was too late. The burden of showing that the demand was made within thirty (30) days after the mistake was discovered in 1892, was upon the plaintiff, and that fact does not appear in the record and the action is barred on that ground.

With this conclusion, it would serve no useful purpose to consider the grave matters presented by the defendant's answer. In fact the plaintiff's counsel did not desire that we should do so.

Affirmed.

T. H. McNEILL v. GEORGE FULLER et al.

Action for Specific Performance—Sale of Decedent's Real Estate—Purchase of Decedent's Land by Administrator—Color of Title—Adverse Possession—Landlord and Tenant—Vendor and Purchaser—Statute of Frauds—Accounting by Administrator.

1. Where A, an administrator, asked a bidder to attend the sale by him of his intestate's land and to make the property bring its value and told him that if he did not have the money to pay the price he (the administrator) would get it for him, and soon after the sale A, as administrator, made a deed to the bidder who, three days later, reconveyed to A individually, and no money passed between the parties; *Held*, that, notwithstanding A claimed that the land was not bid off for him at the sale, the just inference was that A purchased it through his agent, the bidder.
2. Where an administrator, in making a report of the sale of personalty, stated that the proceeds were insufficient to pay the debts; that intestate died seized of certain land in which the widow claimed a dower, and that she and the heirs desired to have the land outside of the dower sold to pay debts, but no summons was issued or served on the heirs making them parties and no order of sale was made; *Held*, that while the allegations contained in such report might have sufficed as an informal complaint, if proper parties had been made and an order of sale had followed, yet, in the absence of such parties and order, the allegations were not sufficient to sustain a sale of the land by the administrator.
3. Where an administrator procured a bidder to buy his intestate's land at an unauthorized sale and the bidder immediately reconveyed to the administrator individually, and no money passed at either transaction; *Held*, that the bidder's deed to the administrator was color of title without reference to the lack of the administrator's authority to sell or to the character of the transaction.
4. For the purposes of acquiring title by prescription the possession of a tenant or of a purchaser under a bond for title, is the possession of the landlord or of the vendor respectively.

5. While a bargainee of land is not bound to take a defective title from his bargainor, it is not necessary that the latter should have a perfect title at the date of the contract to sell, but it is sufficient if the title is perfect at the time the contract is attempted to be enforced by either party thereto.

6. A party to a contract for the purchase of land, who has given his notes for the purchase price, is at the wrong end of the contract to plead or take advantage of the Statute of Frauds when the vendor, who has executed no bond for title, is nevertheless able and willing to convey a good title.

7. An administrator who procured a bidder to buy his intestate's land at a sale made by himself as administrator and, after making a deed to the bidder, took a reconveyance to himself individually, (no money having passed in either transaction) and reported to the Court that the land fetched a certain sum, is chargeable with such sum and interest from the date of the sale although he disclaimed purchasing the land on his own account and, immediately after the conveyance to himself, contracted to sell to other parties at a less price.

CIVIL ACTION for the enforcement of a contract for the purchase of land tried before *Coble, J.*, and a jury at April Term, 1897, of CUMBERLAND Superior Court. There was a verdict for the defendant and from the judgment thereon plaintiff appealed.

Mr. H. L. Cook, for plaintiff (appellant).
Mr. N. W. Ray, for defendant.

FURCHES, J.: This is an action for specific performance, in the nature of a foreclosure. The plaintiff alleges that he is the administrator of one Fenner Fuller, deceased, and as such administrator he procured an order of Court, sold the land in controversy, to pay debts of his intestate; that at said sale Marion Stephens became the purchaser at the price of $260; that he did not get Stephens to bid off the property for him, but he asked Stephens to attend to the sale and make the property bring its value, and that he told Stephens if he did not have the money to pay for the land that he would get the money for him; that soon after the sale and on the 9th of March, 1884, he made Stephens a deed for the land, and on the 12th, three days thereafter, Stephens made him back a deed for the same land. That in this transaction there was no money passed, Stephens paid him nothing and plaintiff paid Stephens nothing.

It was argued here for the plaintiff that this land was not purchased for him by Stephens, but, taking these facts as shown by his own testimony, the Court might well have instructed the jury that it was purchased by the plaintiff through his agent, Stephens.

We have never been called upon to consider a more carelessly managed estate by an administrator, nor a more defective proceeding to sell real estate. We are satisfied from an examination of the records offered in evidence that there never was any summons, petition or complaint, nor order of Court to authorize the plaintiff to sell this land. We are satisfied that the only thing the plaintiff ever did, looking to a sale of the real estate of his intestate, is contained in a statement made in his report of the sale of the personal property in which it is stated that the personal property was insufficient to pay intestate's debts and that he died seized and possessed of this and some other real estate; and "that the widow and heirs are desirous to have the remainder of the real estate sold to make assets to pay the indebtedness of the estate." This is made after stating that the widow claimed the home place as her dower.

This might be treated as a *very* informal complaint, but sufficient to sustain a sale, properly and honestly made, if there had been proper parties made and an order of sale. But none of this was ever done. The heirs at law of Fenner Fuller were never made parties. No summons was ever issued bringing them into Court and no order of sale was ever made. We are satisfied of this. Therefore, the Court must treat this pretended sale of the plaintiff, at which he in law became the purchaser, as a nullity and as passing no title. If the case ended here, the judgment of the Court below would be affirmed.

But on the 12th day of March, 1884, Marion Stephens makes a deed to the plaintiff conveying this land to him in fee simple, and this deed has been probated and registered. The plaintiff testifies that the defendants rented this property from him and were his tenants, and on the 7th day of April, 1885, they made a contract with him for the purchase of said land; that at that time they executed to him their notes for $150 each and he executed a bond to make them a title on the payment of these notes, they being for the amount of the agreed price they were to pay him for the land. He also alleges and swears that said notes have never been paid, and that he is ready and able to make such title upon the payment of the purchase money.

The deed from Stephens to the plaintiff was color of title, without reference to the want of authority of plaintiff to sell to Stephens. And the possession of the defendants, first as his tenants, and then under a contract to purchase, was the possession of plaintiff. The possession of a vendee, holding under a bond for title, is the possession of the vendor. *Bradsher* v. *Hightower*, 118 N. C., 399. This possession having commenced in the Spring of 1884, and continuing until now, ripened the colorable title from Stephens into a perfect title in the plaintiff, unless there are parties interested in the land who are under disabilities. There seems to have been two of the children of Fenner Fuller who were minors in 1884. But the youngest of them is 26 years old now, having been 13 in 1884.

A purchaser is not bound to take a defective title from his bargainor; nor is a bargainor bound to have a perfect title at the date of the contract to sell. It is sufficient if the title is perfect at the time it is attempted to be enforced either by the bargainor or the purchaser. *Hobson* v. *Buchanan*, 96 N. C., 444.

Upon this undisputed evidence as to the Stephens deed and the continuous possession of the defendants, it would seem that it would have been proper for the Court to have charged the jury that, if they believed the evidence, the plaintiff was the owner of the land and could make a good title to the same; that the defendants had contracted to purchase the same of him at the price of $300, secured by the notes offered in evidence; that there was a bond for title from plaintiff to defendants. But if there was no bond, the defendants are at the wrong end of the contract to plead or take advantage of the Statute of Frauds. *Taylor* v. *Russell*, 119 N. C., 30.

But, as the case goes back for a new trial, other facts may be developed by the defendants. They may prove that they did not buy or that there have been such transactions between them and the plaintiff as to show that they have not continued to hold said land, as his bargainee.

We think it is time the plaintiff had settled his intestate's estate. And as he reported the sale to the Court that the land brought $330, he is chargeable with this sum and interest thereon from the date of the sale, when Stephens bid it off, to the date of his settlement. *Highsmith* v. *Whitehurst*, 120 N. C., 123. And if the plaintiff does not settle the estate and properly account for this amount, we can see no reason why defendants may not be entitled to the two-fifths of this amount, as a payment or counter claim on their purchase indebtedness, provided they set up this defence. There is error.

New trial.

JOHN C. McCASKILL v. M. McKINNON and wife.

Action to Foreclose Mortgage—Mortgage—Privy Examination of Married Woman—Presence of Husband—Duty of Officer taking Privy Examination of Married Woman—Equitable Lien on Married Woman's Land for Husband's Debts.

1. In the trial of an issue as to whether a married woman had been privily examined separate and apart from her husband, touching her free and voluntary consent to the execution of a mortgage signed by her, her own testimony that she did not declare such consent to the examining officer but objected to signing the instrument and signed it only after her husband told her to do so, and testimony of the examining officer that he did not explain the paper or the nature and purpose of the privy examination or question her as to her free consent, and other testimony showing that the husband was in sight and hearing of his wife and the officer during the pretended examination, constituted evidence proper to be submitted to the jury upon the issue.
2. Where, in the trial of an issue whether a married woman voluntarily executed a mortgage and was privily examined separate and apart from her husband touching her voluntary execution thereof, it appeared that the examining officer, purporting to have taken her acknowledgment, represented her as stating that she signed the same freely and voluntarily and the evidence was all directed to what she said at the time of the examination, it was not error to instruct the jury that if she, upon her examination, did not state to the officer that she signed the mortgage freely and voluntarily, the jury should answer the issue in the negative.
3. It is the duty of an officer, when taking the privy examination of a married woman as to her voluntary execution of an instrument, to explain the same to her and to see that the provisions of the Statute are strictly complied with; otherwise such examination is invalid.
4. A married woman whose husband was threatened with the sale of his own land under mortgage, consented to sell and convey her own land to the mortgagee in settlement of the mortgage upon her husband's land of which she was to become the owner. The deed by which she conveyed her land described it as her own land, and the recited consideration was applied without her knowledge to the credit of a debt of her husband other than that secured by the mortgage. Subsequently, the mortgagee sold her husband's land and procured it to be bid in for the wife and conveyed to her and attempted to take a

> reconveyance by way of mortgage for the original debt for which it was mortgaged and another debt owed by the husband. The mortgage was invalid by reason of the want of a privy examination of the wife as to her voluntary execution of the same. *Held*, that the creditor has no equity to have his debt declared a lien upon the land, since the wife had bought it with her own separate estate and had not authorized its value to be applied otherwise than to the satisfaction of the mortgage on the land which she so bought

Civil action tried before *Coble, J.*, and a jury at April Term, 1897, of Richmond Superior Court. There was a verdict for the defendants and from the judgment thereon plaintiff appealed.

Messrs. J. F. Payne, Frank McNeill, and *Shepard & Busbee*, for appellant.

Messrs. McRae & Day, and *J. D. Shaw, Jr.*, for defendants.

Furches, J.: This action is to foreclose a mortgage which plaintiff alleges the defendants, McKay McKinnon and wife Grace H. McKinnon, executed to him, dated August 28, 1886. The land conveyed in this mortgage belonged to the *feme* defendant and was to secure an indebtedness of the husband McKay McKinnon.

The record in this case is voluminous, containing many exceptions involving questions as to competency of evidence admitted and rejected—the question of agency—and the right of the agent to apply money in his hands as such agent to the payment of his individual indebtedness. Among the many questions presented by the record there are two, the solution of which will determine the rights of the parties. This being so, we proceed to consider them and thereby avoid the consideration of a great many other questions presented by the appeal.

It is denied by the defendants that the privy examination of the *feme* defendant was taken as to the mortgage the plaintiff now seeks to foreclose. If it was not, the plaintiff cannot have a judgment of foreclosure. Plaintiff says that if this is so he is entitled to an equitable lien on the land for the payment of his debt. The jury found that the private examination of the *feme-covert* was not taken to the mortgage. This settles the matter of plaintiff's right to foreclose, unless there has been error committed by the Court in the evidence admitted or rejected, or in the instructions given to the jury.

The evidence offered upon this issue, as to whether Mrs. McKinnon was privily examined or not, was that of D. A. Patterson, the Justice who made the certificate of privy examination, and of McKay McKinnon, the husband of the *feme* defendant, and her own testimony. There are no exceptions to Patterson's evidence, and while there were exceptions to the evidence of both McKinnon and his wife, there were none to their evidence on this issue. This being so, if there was evidence upon which the jury might reasonably find the issue in the negative, this finding must stand.

The witness Patterson among other things testified that "after Mr. McCaskill and Mr. McKinnon retired, the witness read over the certificate, or started to read, and thinks he read it. She wanted to explain something, or wanted witness to explain something, witness don't remember; something witness didn't know anything about. Mr. McKinnon came back to the door and told her it was all right, or words to that effect. The matter dropped right there; there was no more said and witness signed the paper. McKinnon came to the parlor door; witness and Mrs. McKinnon were inside the parlor; there was a hall and door from hall to parlor; witness was from the parlor door several feet."

The *feme* defendant testified that plaintiff, witness Patterson, her husband and herself were all at her house; that she and Patterson were in the parlor, and plaintiff and her husband were in the parlor, or in the piazza; were part of the time in one place and then in the other. She says she "did not execute the deed freely and voluntarily; did not tell Mr. Patterson that she signed the deed freely; she objected to signing the mortgage. After she raised an objection, she signed it; after she raised objection don't think Mr. Patterson asked her if she signed it freely and voluntarily; don't think anything was said while witness was in the parlor; she could see plaintiff and Mr. McKinnon. Mr. McKinnon was certainly where he could see her during the whole of the time. She recollects signing the mortgage; after she wrote her name to the paper she never told Mr. Patterson or any one else, that she signed it freely and voluntarily."

The husband, McKay McKinnon testified that "Mrs. McKinnon and Mr. Patterson were in the parlor about 6 or 7 feet from where witness was on the piazza; she refused to sign the mortgage; witness heard her tell Mr. Patterson so; witness was in hearing distance all the time and in sight of them, was sitting in the window; they had some trouble about signing it in there, and witness and McCaskill went in the parlor before she signed it and witness told her to sign it; witness and McCaskill were both present; she did'nt state that she signed it voluntarily and freely, after they went back, and there were no more questions asked her about it; she just signed it, and Mr. Patterson signed his name, and they all came out."

The plaintiff McCaskill testified: "Notes and mortgage were signed by the defendants, and after that Mr. McKinnon and witness retired to the piazza; witness could not hear what Mr. Patterson and Mrs. McKinnon said, and Mr. McKinnon was out there with witness."

There is some conflict in this evidence between the plaintiff and the other witnesses, Patterson, McKinnon and wife Grace. But not as to what occurred between Patterson and the *feme* defendant, as the plaintiff swears that he was not in the parlor and could not, and of course did not hear what took place. But whatever conflict there may be, it was a matter for the jury to consider and determine what the truth of the matter was, and not for us. The only question that comes to us for our determination is whether the evidence was such as the Court should have submitted this issue to the jury upon, and we are of opinion it was.

But plaintiff contends that if there was sufficient evidence to carry this issue to the jury, there was error in the Judge's charge in submitting it to the jury. We therefore reproduce the entire charge of the Court upon this issue, believing this to be entirely fair to the plaintiff, which is as follows:

"The 3rd issue is—

'Did Grace H. McKinnon freely and voluntarily execute the mortgage described in the complaint, and was she privately examined, separate and apart from her husband, touching her voluntary execution of the same?'

"The certificate of the Justice of the Peace to the mortgage states that the *feme* defendant was examined separate and apart from her husband touching her voluntary execution of the same, and that she stated that she did sign the mortgage freely and voluntarily, without fear or compulsion on the part of her said husband or of any other person, and that she did at the time she was so examined freely and voluntarily consent thereto.

"The jury are instructed that the certificate of the Justice of the Peace is presumed to be true, and that the burden of proving that it is not true is upon the defendants. If the defendants have rebutted this presumption by proof and have shown that the *feme* defendant did not freely and voluntarily execute the mortgage, and that she was not privately examined separate and apart from her husband touching her voluntary execution of the same, the jury will answer this issue 'No.'

"If the *feme* defendant executed the mortgage described in the complaint freely and voluntarily and if she was privately examined, separate and apart from her said husband touching her voluntary execution of the same, the jury will answer this issue 'Yes.'

"The defendants contend that the *feme* defendant objected to signing the mortgage; that she and the Justice of the Peace, Patterson, were in the parlor and that she objected to signing the mortgage; that her husband and plaintiff were in her sight and hearing, that her husband came to the door of the parlor and she signed the mortgage, but that the J. P. never asked her whether she signed the same freely and voluntarily and never examined her separate and apart from her husband touching her voluntary execution of the same. That her husband was never out of her presence, and that neither was McCaskill.

"The plaintiff contends that the *feme* defendant did sign the mortgage freely and voluntarily, and that she was examined, separate and apart from her husband, touching her voluntary execution of the same.

"The jury are instructed that it was not necessary to the validity of the examination of the *feme* defendant by the J. P. that her husband should have gone entirely out of the room; it was only necessary that he should have gone separate and apart from the *feme* defendant, and so far as to leave her free to express to the J. P. her will and desire with respect to the alleged mortgage, freely and voluntarily.

"The defendants contend that the male defendant did not go separate and apart from his wife so far as to leave her free to express her will and desire with respect to the alleged mortgage freely and voluntarily, and that in fact the J. P. never did ask her whether she freely and voluntarily signed and consented to the mortgage.

"As above instructed the burden is upon the defendants to rebut the presumption raised by the certificate of the J. P. If they have rebutted this presumption the jury will answer this 3rd issue 'No.'

If they have failed to rebut it, the jury will answer the 3rd issue 'Yes.' "

In response to prayer for instructions by defendants' counsel the Court charged the jury that if Mrs. McKinnon on her examination by the Justice of the Peace, Patterson, did not state to him on such examination that she signed said mortgage freely and voluntarily, the jury should answer the 3rd issue 'No.' "

Plaintiff excepted.

The Court further instructed the jury on this issue in response to prayers by defendant's counsel: "It was the duty of the Justice of the Peace in taking the privy examination of Mrs. McKinnon to explain the same to her and see that the provisions of the statute were strictly complied with, and if in this case the Justice failed to do so you will answer 3rd issue "No."

Plaintiff excepted."

But our attention was called more particularly to the two last paragraphs.

Plaintiff says it was error to charge the jury "that if Mrs. McKinnon, on her examination by the Justice of the Peace, Patterson, did not state to him on such examination that she signed said mortgage freely and voluntarily, the jury will answer the third issue No." We see no error in this instruction. It is the duty of the Judge to adapt his charge to the evidence bearing upon the issue before the jury—to the case in hand. The certificate of the Justice of the Peace says it was taken separate and apart from her husband, and that she "doth state that she signed the same freely and voluntarily, without fear or compulsion, &c." The evidence was all directed to what she said. There is not a suggestion in the evidence that she assented to the examination or expressed her free and voluntary assent in any other way than by saying that she did. We do not say that a case might not be presented where the acknowledgement might not be shown, without using the exact words used in the charge. But, from the evidence in this case, the charge appears to us to have been proper.

The plaintiff further excepts to the last paragraph of the charge. He complains that the Court charged that it was the duty of the Magistrate, Patterson, "to explain the same to her, and see that the provisions of the Statute were strictly complied with, and in this case if the Justice failed to do so, you will answer the third issue No." We see no error in this instruction. At common law a *feme-covert* could only convey her land by the fictitious action of fine and recovery. This has been changed by Statute in England and in this State, so as to allow her to alien her land by deed in which her husband joins, and privy examination. The right to take privy examinations for a long time was given to the Judges of the Supreme and Superior Courts, and to the Courts of Pleas and Quarter Sessions in term time, and when in session as an organized Court. When this Court was abolished by the Constitution of 1868 and the Acts of legislation following, this right was given to the Clerks of the Superior Courts as the successors of County Courts. This was well enough, as the clerks were elected by the whole people of the County and were likely to be men of character and intelligence. But the Legislature, upon the plea of convenience have increased the list of those who may take privy examinations to a great number of officers. They, next after the clerks, gave it to Justices of the Peace, then to notaries public, and then to deputy clerks, but it has not yet been given to policemen. Convenience is a good thing, but it is a mistake to place convenience before the protection afforded or intended to be afforded married women in taking their privy examinations. The object of the privy examination was to protect wives from having their estates squandered by unkind, dissipated, spendthrift husbands. This in our opinion should be more regarded than mere convenience. Upon this line of thought we must be pardoned for quoting a paragraph from the opinion delivered by *Ruffin, J.*, in *Burgess* v. *Wilson*, 13 N. C., (at p. 311). That great lawyer in discussing the subject of privy examination says: "After open confession in Court, she is then to be examined, when in privacy, and with self collection, which a timid female, in the presence of a crowd and overawed by the authority of her husband, might not be able to command in public, that she may have an opportunity of retracting her deed after her interests have been weighed by her, and her rights *explained* by an intelligent and upright judicial officer. This being done all at once, there is not so much apprehension, though certainly some even here, of malversation in the examining magistrate. The danger of immediate detection would subdue his disposition to aid in the undue machinations of a cruel husband. But the facility for practicing abuses on the wife would be great indeed, if the trust of receiving her acknowledgment were reposed in a single justice of the peace as a matter *in pais.*"

Although this duty has been given to other persons than Judge Ruffin and the able Court of which he was a member, at the time this opinion in *Burgess* v. *Wilson* was delivered, still the manner in which it should be done is the same now that it was then. And thus understanding the law, it seems to us that the charge of the Court should be commended rather than condemned.

These examinations carry with them the presumption of being true, as they should do, or the titles to much of the landed property in this State would be insecure. And this makes it much more important that they should be taken by men of intelligence and character. We see no error in this ruling, and the only question that remains to be considered is the equities of the case.

The plaintiff contends that, if he is held not to be able to enforce his mortgage, it would be inequitable and unconscionable for the *feme* defendant to repudiate the contract and be allowed to retain the land. And he asks the Court so to declare, and by some means give him relief. For this contention he cites *Burns* v. *McGregor*, 90 N. C., 222; *Wood* v. *Wheeler*, 106 N. C., 512, and *Draper* v. *Allen* 114 N. C., 50, but we are unable to see that they apply to this case.

The facts in brief are that McKay McKinnon, husband of the *feme* defendant, was indebted to the plaintiff in the sum of $900, evidenced by three promissory notes, and in 1876 he executed a mortgage to the plaintiff on the land in dispute to secure this debt, that in 1884 the plaintiff was pressing the husband for these debts and threatened to foreclose. The *feme* defendant agreed, through her husband, to sell the plaintiff real estate which she owned in the town of Fayetteville for $1,200, in payment of the mortgage debt, and that she was to become the owner of the mortgaged land (which seems to have been her home), in place of her Fayetteville property. And on February 14, 1884, the defendants executed a deed to the plaintiff for the wife's property in Fayetteville at the price of $1,200, in which deed it is stated that it was the wife's land, willed to her by her deceased father. So, the plaintiff took title to this land, knowing that it was the land of the *feme* defendant. The plaintiff and his brother afterwards sold the land in controversy as mortgagees, bid it off for the *feme* defendant at the price of $1,000, and made her a deed therefor; and on the same day undertook to take the mortgage upon which this action was brought. The plaintiff alleges that he entered a credit on a book account he had against the husband, for the $1,200, the price of the Fayetteville land. And the debt which this mortgage was intended to secure was the debt due by the first mortgage debt and a balance of five hundred and some dollars, which the husband still owed him on his book account. There is some conflict in the evidence about this, but one thing remains undisputed, that the plaintiff got twelve hundred dollars worth of the *feme* defendant's land, and she has never received anything for it, unless it is the land in dispute. He knew that the Fayetteville land belonged to the *feme* defendant, as it is so stated in the deed, and it is not pretended that the *feme* defendant ever consented that the price of this land should be entered as a credit on her husband's book account with the plaintiff. And if it was so entered, even with the consent of the husband, it was unauthorized and a fraud on her. *Williams* v. *Johnston*, 92 N. C., 532. All the debts were the debts of the husband, and not the wife's debts. Her land is gone, the plaintiff is the owner of it, and she has nothing in consideration but the land in dispute. Under these circumstances we cannot interfere with her title. *Williams* v. *Walker*, 111 N. C., 604.

Affirmed.

S. BEVAN et al. v. O. L. ELLIS et al.

Homestead—Allotment, where Filed—Constructive Notice—Judgment Lien on Allotted Homestead—Statute of Limitation.

1. It is not necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the County in which the homestead is situated, (provided it is filed in the

judgment roll of the action in which the judgment was rendered) in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire. The filing of the return in the judgment roll, in compliance with Section 504 of *The Code*, is constructive notice to all who have dealings with the homesteader concerning the homestead.

2. The lien of a judgment on land in which a homestead has been duly allotted does not cease upon the expiration of ten years from the date of the judgment but continues during the continuance of the homestead estate, notwithstanding a sale and conveyance of the land by the homesteader. (CLARK, J., dissents *arguendo*).

CIVIL ACTION tried before *Robinson, J.*, and a jury at January Term, 1897, of FRANKLIN Superior Court. The action, commenced on the 7th of January, 1896, was to subject to the payment of plaintiff's judgment rendered and docketed in 1872, land which had been allotted to the judgment debtor as a homestead but which had been conveyed by the judgment debtor thereafter and by *mesne* conveyances had been acquired by defendants.

It was admitted on the trial:

That Edgar Miller is the surviving partner of Samuel Bevan and Company, and that R. A. Speed died intestate in the same county of Franklin in 1885, and that the defendant O. L. Ellis was duly appointed and qualified as his administrator, and is still such administrator.

That R. A. Speed, Jr., is the son of R. A. Speed, Sr., and that the Perry defendants are the infant children of Wm. Perry deceased. And being without general or testamentary guardian, that B. B. Massenburg has been appointed and appears in this action as their guardian *ad litem*.

That the widow of R. A. Speed, Sr., who survives him, is seized and possessed of a homestead in her own right, worth a great deal more than $1,000.

That on the 3rd day of March, 1871, R. A. Speed executed his bond to the plaintiff in the sum of $457, in which he covenanted not to claim any homestead and personal property exemption against the collection of said bond.

That the plaintiff brought suit on said bond and on account against said R. A. Speed for $95.39, and obtained judgment against the said R. A. Speed at the September Term, 1872, of Franklin Superior Court for $552.54, with interest on $457 from March 3rd, 1871, and on $95.39 from February 9th, 1872, until paid, and the costs of this action.

That on the 22nd day of June, 1873, the plaintiff procured execution to issue on said judgment, and the defendant R. A Speed claimed his homestead exemption and the Sheriff summoned appraisers to allot and set apart to him his homestead. The appraisers allotted to him as his homestead all the land he owned to-wit, 379 acres on Sandy Creek, adjoining the lands of J. F. Jones, Kindred Gupton and others. The Sheriff returned the report of the appraisers to the next term of the Court, and the execution also, with the endorsement: "Nothing found in excess of the homestead exemption to satisfy said judgment."

That upon the coming in of the report of the appraisers and the return of the execution, the plaintiff moved to set aside both as to so much of the judgment as was recovered on the bond for $457, upon the ground that the defendant in the action having waived, upon the face of the bond, his right to a homestead, was not entitled thereto. The Court overruled the motion, and the plaintiff excepted and appealed to the Supreme Court. The Supreme Court approved the judgment of the lower Court. (See Volume 74 of the Supreme Court Reports.)

That the said allotment of the homestead embraces the whole of the land mentioned in the complaint, but that while the same was returned to the Clerk of the Court and filed with the papers in the case, yet the said return was not recorded in the registry of Franklin County, as by the Statute provided, until the 22nd day of January, 1897—long after this suit was instituted, but before the trial.

That on the 21st day of November, 1878, R. A. Speed and wife conveyed in fee, for a money consideration, to J. J. Davis all their right, title and interest in and to the land, described in the complaint as "a tract of land containing 309 acres," which said conveyance is recorded in the Register's office of Franklin County, Book 79, at page 485. This deed was introduced in evidence.

That theretofore, as set out in said deed, R. A. Speed and wife had mortgaged a part of said land to Thomas White, guardian, and had conveyed the other part in fee to W. H. Davis, which said deeds were dated respectively, March 22, 1877, and March 25, 1876, and were recorded in Book 45, at page 263, and in Book 45, at page 66, as set out in said deed of R. A. Speed and wife to J. J. Davis.

These deeds were introduced in evidence.

That thereafter said J. J. Davis paid off the debt to Thos. White, guardian, and also acquired the title to said land conveyed in said deed to W. H. Davis.

That on the 8th day of January, 1883, the said J. J. Davis conveyed 208 acres of the said land to R. A. Speed, Jr., and that on the same day the said R. A. Speed, Jr., executed to the said Davis a mortgage deed, whereby he conveyed the said land to secure the purchase money for the same. The said deed and mortgage are recorded in the said Register's office in Book 60, at page 526. The said deed and mortgage were introduced in evidence.

That thereafter the said J. J. Davis assigned and endorsed for value the said note and mortgage, when past due, to the said Raleigh National Bank, as collateral to secure a note executed by him to said bank for borrowed money, as appears from the record. That thereafter J. J. Davis conveyed the balance of said land, to-wit, 108 acres, to J. F. Jones, who is now (and had been for more than seven years before the beginning of this action) in the actual possession thereof.

That since the execution of the said deed to the said W. H. Davis, the said W. H. Davis and those claiming under him, have been in continuous possession of the land described in the said deed, and claiming it under said deed, until the execution of the said deed by R. A. Speed and wife to J. J. Davis; and that thereafter the said J. J. Davis, and those claiming under him, have been in continuous possession of the two said tracts of land, to-wit, the one mortgaged to Thomas White, guardian, and the one conveyed to W. H. Davis, claiming the same under their said deed as their own and under known and visible boundaries. That since the execution of said deed from J. J. Davis to R. A. Speed, Jr., the said R. A. Speed, Jr., and those claiming under him, have been in continuous possession of said tracts of land, claiming the same under said deed as their own, and under said known and visible boundaries.

The Court, upon the request of the defendants, instructed the jury, that inasmuch as the allotment of the homestead was not registered in the office of the Register of Deeds of Franklin county until the 21st day of January, 1897; and that inasmuch as it was admitted that the several defendants had entered upon the lands described in the complaint, under the deeds executed to them, which were color of title, and had been in possession of said tracts of land under known and visible boundaries for seven years before the beginning of this action, that they should answer the issue, "Yes."

The jury responded accordingly, and the plaintiff excepted.

There was a motion for a new trial by the plaintiff. Motion overruled and plaintiff excepted and appealed.

Mr. C. M. Cooke, for plaintiffs (appellants).

Messrs. F. S. Spruill, W. M. Person and *Shepherd & Busbee*, for defendants.

MONTGOMERY, J.: At the Fall Term, 1872, of FRANKLIN Superior Court, Samuel Bevan, William A. Williams and Edgar Miller, trading under the firm name of Samuel Bevan & Co., obtained a judgment against R. A. Speed for money and costs, and under an execution issued on the judgment, returnable to the Spring Term, 1873, of that Court, the Sheriff had, through appraisers, the homestead of the defendant allotted to him. The allotment embraced the whole of the debtor's real estate and was returned by the Sheriff to the Clerk of the Court soon after it was made, and it was filed by the Clerk at that time in the judgment roll in the case where it has been ever since. The Clerk of the Court, however, did not send a certified copy of the homestead return to the Register of Deeds, nor was the same registered until after the commencement of this action.

The defendant homesteader is dead, his widow owns a homestead in her own right, and the youngest child is more than twenty-one years old, and Edgar Miller, as surviving partner of the original plaintiffs, brought this action on the 7th day of January, 1896, to subject the homestead to the payment of the judgment of 1872 as a first lien. The defendants claim title to the land, which was the homestead, under *mesne* conveyances and set up in their several answers back to deeds from Speed and wife of dates 1876, 1877, 1878; and aver that they bought without notice of the allotment of the homestead—the allotment not having been registered in the office of the Register of Deeds.

Two questions are presented in the record for our decision. The first is whether it is necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the county in which the homestead is situated, and also to have it filed in the judgment roll of the action in which the judgment was had, in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire; and the second is whether the lien of a judgment procured in 1872, the homestead having been duly allotted, continues only during the ten years next after the rendition of the judgment or whether it lasts during the continuance of the homestead estate.

We will now take up, in order, the discussion of the first question.

The Code, Section 504, which is Section 4 of Chapter 137 of the Laws of 1868–'9, requires that "The appraisers shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exemption, which shall be returned by the officer to the Clerk of the Court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the Clerk shall be registered in the office of the Register of Deeds for the county. . . ." The defendants' counsel cited the case of *Smith* v. *Hunt*, 68 N. C., 482, as an authority for the indispensable necessity of the registration in the office of the Register of Deeds of the homestead allotment and return. That case did not present that point. There, the homestead and personal property exemptions appeared to have been allotted and appraised by petition before a Justice of the Peace, and the only point presented arose upon the complete failure of the return to show a descriptive list of the personal property which was set apart as the personal property exemption of the debtor. The return of the appraisement and allotment had been duly registered, but because of a lack of description of the personal property in the allotment, the proceeding was in that case held void by this Court.

Registration in the office of the Register of Deeds is clearly indispensable in cases where the allotment of the homestead exemption is made on the petition of the homesteader, as was the case in *Smith* v. *Hunt*, *supra*, for the reason that there is no other method which could reasonably give notice of the allotment.

In *Gully* v. *Cole*, 96 N. C., 447, the Judge who delivered the opinion for the Court said: "The report of the allotment or appraisal whether made by the Sheriff and the appraisers simply, or by confirmation of the Superior Court in term time, is required to be registered, the object being to give notice, &c." We do not understand that language to mean that, where the report of the allotment of the appraisers has been filed with the judgment roll, a failure to register the same in the Register's office would make the allotment void. That point however was not raised in *Gully* v. *Cole*, *supra*, and the declaration of the Judge was purely a dictum, if it can be construed into meaning that registration was absolutely necessary to the validity of the allotment and to the attacking of the lien under the judgment where the return of the appraisers had been filed with the judgment roll in the action.

The only question before the Court in the last mentioned case was whether a homestead could be reallotted in different proceedings without proof of fraud or other irregularities.

The object of the law in requiring the return of the appraisers to be filed with the judgment roll in the action and registered in the office of the Register of Deeds is, of course, to give sufficient notice to all persons who may have transactions with a debtor concerning the land embraced in the homestead, that there is or was an encumbrance by judgment lien upon it, which would continue until the expiration of the homestead estate unless sooner discharged by payment. The object of the notice is not to inform the creditors of the homesteader that the homestead, after it is allotted, cannot be sold under execution for his debts; because the creditors are presumed to know that that was so even before the homestead is allotted. We are of the opinion that the requirements of the law are sufficiently complied with wherever it appears that the return of the appraisers of the allotment is filed in the judgment roll in the action. The law, Section 504 of *The Code*, requires the return of the appraisers to be filed with the judgment roll in the action, and compliance with that requirement is constructive notice to all who may have dealings with the homesteader concerning the homestead estate and all such persons must at their peril, examine the judgment roll and all that it contains. If upon such examination of the judgment roll the return of the appraisers is found there, then there is no need to examine the registry in the office of the Register of Deeds.

The defendants in this action, if they had examined the judgment roll in *Bevan* v. *Speed*, *supra*, would have found the appraisers' return of the allotment of the defendant's homestead.

We will now discuss the other question, whether the lien of a judgment procured in 1872, the homestead having been duly allotted, continues only during the ten years next after the rendition of the judgment, or whether it lasts during the continuance of the homestead estate. There have been numerous decisions of this Court from *McDonald* v. *Dickson*, 85 N. C., 248, in which judgments have been considered liens upon the homestead, until the homestead estate shall expire, wherever the homestead has been actually allotted under such judgments docketed. In *Mebane* v. *Layton*, 89 N. C., 396, the Court said "but the statute—Bat. Rev. Chapter 55, Section 26, in force at the time of the supposed sale (about 1881) forbids in terms the levy and sale under execution for any debt of the reversionary interest in lands included in a homestead until *after the termination* of the homestead interest itself. The purpose of this Act was not to enlarge the homestead or to deprive the creditor of the estate or property after the homestead right should be at an end, but it was to have the property preserved and the right of the creditor to have the same sold postponed until it might be sold for its reasonable value." That language, beyond question, shows that the Court were of the opinion that the effect of the Statute (Bat. Rev. Chapter 55, Section 26) when the requirements of the law as to the actual allotment of the homestead had been complied with, was to continue the lien of the judgment beyond ten years and until the homestead estate had expired. The same idea, in language as clear, is expressed in *Morton* v. *Barber*, 90 N. C., 399; *Rankin* v. *Shaw*, 94 N. C., 405. In *Wilson* v. *Patton*, 87 N. C., 318, the homestead was not set apart because some of the judgments were recovered upon notes dated prior to the 1st, January 1868, and the whole land was sold with the debtor's consent. This Court held as to the distribution of the proceeds of the sale, that, after the executions which had been issued on the judgments obtained on debts due before January 1868, should be paid, the homesteader should be entitled to receive the balance (not to exceed $1,000.) but to hold it only during his life, the remainder to be subject to the lien of the judgment as if it was land, upon his giving bond and security to secure the return of the amount, upon his death, to be applied to such judgment or judgments as should remain unsatisfied, according to priority of docketing. In *Vanstory* v. *Thornton*, 112 N. C., 196, a distribution of funds arising as in the case of *Wilson* v. *Patton*, *supra*, was ordered by this Court, the Court recognizing the continuation of the lien of the judgment, when the allotment had been made according to law, until the expiration of the homestead estate. In *Jones* v. *Britton,* 102 N. C., 166, the Court said: "The latter (the creditor) when the exemption from sale is over should find the property not exhausted and rendered valueless but substantially as it was when the exemption began. . . . The law expressly gives the judgment creditor a lien on the homestead. This lien is not meaningless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt as far as will be necessary when and as soon as the exemption of it from sale shall be over. In *Rogers* v. *Kinsey,* 101 N. C., 559, the Court said: "This legislation (Acts 1885, Ch. 359) recognizes the existence of the lien upon the land subject to exemption for the limited period and the right to enforce which in an appropriate manner arises at its expiration." In *Stern* v. *Lee,* 115 N. C., 426, the Court said in speaking of judgment creditors where the homestead had been duly allotted: "By the law they are given a lien. The lien continues in force notwithstanding the debtor's conveyance, unimpaired by the law. The enforcement of their liens by sale is postponed until the determination of the homestead right."

It is true that the Code Commissioners failed to bring forward in *The Code,* Section 26, Chapter 55 of *Battle's Revisal,* and this Court held in *Cobb* v. *Hallyburton,* 92 N. C., 652, that that statute "ceased to operate, because it was not brought forward, on and after the first of November, 1883, (the date when *The Code* went into effect) when the Statute of Limitations again began to run for the protection of the debtor's estate against the judgment." But the General Assembly of 1885 restored the lien of judgments on the homestead estate and provided in Chapter 359 of the Acts of that session that the Statute of Limitations should not run against any payments (judgments) during the existence of such homestead. When the Statute (*Battle's Revisal,* Chapter 55, Section 26), was repealed by the failure of the Code Commissioners to bring it forward into *The Code*, the lien of the judgment in the case before us was complete, the Statute of Limitations having run against it only for about two years when the Act of 1885, as we have said, prevented again the running of the Statute of Limitations against it during the existence of the homestead estate.

The interesting question as to the restoration of the lien of judgments against the homestead, so fully discussed in *Leak* v. *Gay*, 107 N. C., 482, need not be considered here for it does not arise, the judgment lien in the case before us never having expired. There is error in the ruling of the Court below.

New trial.

CLARK, J., dissenting: I concur with the view that it is sufficient that the return of the allotment of the homestead is filed in the judgment roll. The homestead being by the terms of the Constitution, "exempt from sale under execution" against the "owner and occupier" thereof, the homestead right is merely a *cessat executio* and hence the proper place to file the allotment is in the judgment roll. It is true that *The Code*, Section 504, further requires the allotment to be registered but, as the Court in this case holds, this latter is merely directory. It would, on the contrary, be mandatory if the homestead was an estate. Acts 1885, Chapter 147. It was held an estate in *Adrian* v. *Shaw*, 82 N. C., 474, which was sustained by a bare majority in *Stern* v. *Lee*, 115 N. C., 426, but that it is a mere determinable exemption has been held by a unanimous Court in *Fleming* v. *Graham*, 110 N. C., 374, and incidentally in *Allen* v. *Bolen*, 114 N. C., 560. It is also recognized as "a mere stay of execution, nothing more," by Shepherd, J., in *Jones* v. *Britton*, 102 N. C., on page 102; by Bynum, J., in *Bank* v. *Green*, 78 N. C., 247, and in other cases cited in *Thomas* v. *Fulford*, 117 N. C., at page 679. In the latter case, which is the last declaration of the Court on this important subject, the majority of the Judges, "three out of five," held that "the homestead is not an estate but a determinable exemption." 117 N. C., Montgomery, J., at page 682; Avery, J., at page 686, and Clark, J., at page 678. Adhering to this last exposition of the Court upon this much debated subject, it is clear that, upon the homesteader ceasing to "own and occupy" the allotted land, the exemption as to it ceased and determined just as if he had removed out of the State. *Fulton* v. *Roberts*, 113 N. C., 421. It would seem, therefore, under the ruling of the majority in the last case on the subject, that "the determinable exemption" having ceased by the conveyance of the realty by the homesteader, in the mode required by the Constitution, Article X, Section 8, "by deed with privy examination of the wife," all right to exemption ceased with that deed, and the judgment creditor had the right to enforce his lien. Without further citation, reference is made to *Thomas* v. *Fulford*, 117 N. C., at page 678; *Stern* v. *Lee*, 115 N. C., at pages 433–447, and *Vanstory* v. *Thornton*, 112 N. C., at pages 211–223. The two last citations are to dissenting opinions, it is true, but they follow the unanimous decision in *Fleming* v. *Graham*, 110 N. C., 374, and are supported by the reasoning of a majority of the Court in its last enunciation in *Thomas* v. *Fulford*, *supra*.

The exemption from execution having ceased upon the conveyance of the allotted homestead by the husband and wife with her privy examination, the judgment creditor should have taken steps to enforce his lien. Not having done so, his lien expired in ten years thereafter and the purchaser holds the realty freed from the judgment lien. I think the judgment should be affirmed but not for the reasons given by the Court below.

W. S. WALDEN et al. v. N. W. RAY et al.

Action to Recover Land—Adverse Possession for Twenty Years—Limitations.

1. Open and continuous adverse possession of land for twenty years will give title in fee to the possessor as against all *persons* not under disability.
2. Thirty years adverse possession of land will bar an action by the State and such possession need not be continuous nor need there be any connection between the tenants.

CIVIL ACTION for the recovery of land, tried before *Coble, J.*, and a jury at May Term, 1897, of CUMBERLAND Superior Court. The usual issues in ejectment were submitted on which there was a verdict for the defendant and from the judgment thereon the plaintiffs appealed.

Messrs. J. C. & S. H. MacRae and J. W. Hinsdale, for plaintiffs (appellants).

Mr. N. W. Ray, for defendants.

DOUGLAS, J.: This is an action in the nature of ejectment for the recovery of land. The plaintiffs claim through the *feme* plaintiff, whose ancestor went upon the land fifty years ago. The land appears to have been in the uninterrupted adverse possession of the plaintiffs and those through whom they claim for more than twenty years, and, with a slight interruption, for more than thirty years. No paper title was shown by the plaintiffs. The defendant claims under a tax title. The issues submitted were as follows: "1. Is the plaintiff the owner of the land described in the complaint? 2. Is the defendant, N. W. Ray, wrongfully in possession thereof? 3. What damage is plaintiff entitled to recover from the defendant, N. W. Ray?" The jury answered the first issue in the negative, and consequently did not answer the two remaining.

There are several exceptions, only one of which it becomes necessary to consider.

Among other things the Court charged that: "To prove title by possession simply, plaintiff must prove by a greater weight of testimony that she and those under whom she claims have been in the quiet, open and continuous possession *without break* for *thirty* years before the bringing of this action." This was clearly error, as only *twenty* years adverse possession is required to give a title in fee to the possessor, as against all *persons* not under disability. *Code*, Section 144. Thirty years adverse possession is necessary only to bar the State, and this need not be continuous, nor need there be any connection between the tenants. *Code*, Section 139; *Fitzrandolph* v. *Norman*, 4 N. C., 564; *Candler* v. *Lunsford*, 20 N. C., 407; *Reed* v. *Earnhart*, 32 N. C., 516; *Davis* v. *McArthur*, 78 N. C., 357; *Cowles* v. *Hall*, 90 N. C., 330; *Mallett* v. *Simpson*, 94 N. C., 37; *Bryan* v. *Spivey*, 109 N. C., 57; *Hamilton* v. *Icard*, 114 N. C., 532.

This is the practically uniform current of authority both before and after the adoption of *The Code* of Civil Procedure. For this misdirection of the jury a new trial must be ordered.

New trial.

P. C. THOMAS v. THOMASVILLE SHOOTING CLUB.

Implied Contract—Services Rendered.

1. The construction of a contract does not depend upon what either party intended but upon what both agreed.
2. The law implies a promise to pay for work done and accepted and, in the absence of an agreed price or an understanding that nothing is to be paid, the laborer may recover the reasonable value of his services.
3. Where plaintiff, at the instance of defendant, procured leases for the latter which were accepted, and plaintiff, expecting to obtain remu-

nerative employment as steward for the defendant, did not intend to charge for getting up the leases but there was no agreement that he would not do so; *Held*, that plaintiff was entitled to recover the reasonable value of his services.

CIVIL ACTION tried before *Starbuck, J.*, and a jury at Spring Term, 1897, of DAVIDSON Superior Court. There was a verdict for the plaintiff and defendant appealed from the judgment thereon.

Messrs. Walser & Walser, for plaintiff.
Mr. E. E. Raper, for defendant (appellant).

FAIRCLOTH, C. J.: This action is brought to recover for services rendered in procuring hunting ground leases, at the instance of defendant, which were accepted and received by the defendant. The plaintiff testified that when he got up the leases he did not expect to charge for the work, if they should pay balance on his house, which has been paid and should pay him to take charge of their business at lucrative wages. The defendant's president testified that "the consideration for getting up the leases was that we were to buy his property and make him steward of the club at a salary. This was not a contract; it was our intention. . . . Did not employ him as steward because we had a falling out about the house. . . . I told him to get up the leases before we bought the house." So that, there was no contract as to the leases, because the construction of a contract does not depend upon what either party *expected* but upon what both *agreed*. *Brunhild* v. *Freeman*, 77 N. C., 128.

If A agrees to render services to B and it is agreed by both that the services are gratuitous and not to be charged for, then A cannot recover. If A renders services to B and the work is accepted, the law implies a promise by B to pay the value of the work. This is too familiar to need citation of authority.

There was evidence as to the value of the services and the house, and the jury rendered a verdict in favor of the plaintiff for $160. In apt time, the defendant asked the Court to instruct the jury that if the plaintiff, when he got up the leases, expected to make no charge, but expected remuneration afterwards by employment from the defendant, he could not recover for getting up the leases. This prayer was refused, but in lieu thereof his Honor charged that "If Thomas did not intend at the time to charge for getting up the leases, and this was known to the defendant, then he could not charge and recover for the same, but if it was not known to the defendant that Thomas did not intend to charge, then Thomas could afterwards sue for and recover for his services in getting up the leases." Exception. We see nothing prejudicial to the defendant in the charge as given, which included in substance the defendant's prayer or so much thereof as he was entitled to.

When the law implies a promise to pay for work done and accepted, and there is no agreed price, the laborer may recover the reasonable value of his services, unless there be some agreement or understanding that nothing is to be paid.

A physician makes no charge for professional services on his books and payment is resisted on the ground that the services were intended to be gratuitous, and the jury find that the services were rendered without any agreement to pay a definite sum. *Held*, that the law implies a promise to pay what they were reasonably worth. *Prince* v. *McRae*, 84 N. C., 674. Here, as the implied promise is not met by any agreement that there should be nothing paid, the plaintiff is entitled to recover.

Affirmed.

FIRST NATIONAL BANK OF SALISBURY v. W. A. FRIES and wife.

Equitable Lien—Parol Trust—Transmission of Title Subject to Trust—Married Woman.

1. Where husband and wife contracted for the purchase of a lot from C and it was virtually agreed between all parties that the deed should be made to the wife and deposited by the grantor with plaintiff as collateral security for a loan of $1100 to be used in building a house on the lot, and the deed was so made and deposited and the money was so lent and used; *Held,* That the transaction constituted a parol declaration of trust accompanying the transmission of title to the wife who took it subject to the trust which Equity will enforce in plaintiff's favor.
2. In such case, the wife is not entitled to a decree for the delivery of the deed to her until she "does equity" by paying the loan made for her benefit.

CIVIL ACTION tried at Spring Term, 1897, of ROWAN Superior Court before *Starbuck, J.*, and a jury. The facts appear in the opinion. The issues submitted to the jury and the responses thereto were as follows:

"1. Was the deed described in the complaint delivered, with the consent of Mrs. Fries, by the Central Land Company, or any person for them, to be held by bank in escrow until the note was paid?

Answer. 'Yes.'

"2. Was the deed described in the complaint delivered by the Central Land Company to the plaintiff upon an agreement with the defendant, W. A. Fries, professing to act as the agent of the defendant Mrs. Carrie M. Fries, that the plaintiff should hold said deed as security for the note described in the complaint, and that it should be delivered to Mrs. Carrie M. Fries upon the payment of said note?

Answer. 'Yes.'

"3. Was Mrs. Fries named as the grantee in said deed in consideration of the said agreement mentioned in issue No. 2?

Answer. 'Yes.'

"4. Was the money borrowed from the bank for which said note was given used in erecting a residence upon the lot described in the deed?

Answer. 'Yes.'

"5. Was any part of the money borrowed from the bank for which said note was given used in the payment of the purchase-money for the lot described in said deed?

Answer. 'No.'

On the verdict, his Honor rendered judgment that the land be sold to pay the indebtedness due to the plaintiff and defendants appealed.

Mr. Lee S. Overman, for plaintiff.

Mr. Theo. F. Kluttz, for defendants (appellants).

FURCHES, J.: The defendants W. A. Fries and wife, Carrie M. Fries, contracted with The Central Land Company to purchase a vacant lot of land in East Salisbury. By agreement of parties the title to this lot was to be made to the *feme* defendant. And for the purpose of borrowing money from the plaintiff, it was agreed by the parties that this deed should be deposited by The Land Company with the plaintiff as collateral security for the payment of the money, which the plaintiff agreed to furnish the defendants to be used in building a house on said lot. The deed was so deposited and the plaintiff furnished money to defendants from time to time which was used by them in said building, to the amount of $1100; and the *feme* defendant afterwards executed her note to plaintiff for this amount. The note has not been paid, and the plaintiff brings this action to have its debt declared a lien on this lot, and, if not paid, a sale of the lot and appropriation of the proceeds to the payment of its debt.

The defendants answer and admit the execution of the note, deny the other allegations of the complaint, and the *feme* defendant prays for the equitable relief, as she calls it, requiring the plaintiff to deliver to her the deed for said lot.

The jury find that the deed was delivered to the plaintiff by the Land Company, with the consent of the *feme* defendant, to be held as an "escrow" until this note or the money for which it was given was paid, and that the money borrowed from the bank was used in improvements placed on said lot.

The *feme* defendant is not personally liable for the payment of this note. *McCaskill* v. *McKinnon*, at this term. And this Court has repeatedly held that a married woman cannot sell her land except by deed nor bind the same for the payment of the husband's debts, except by mortgage and privy examination. *Farthing* v. *Shields*, 106 N. C., 289.

But the *feme* defendant does not fall within the protection afforded married women by this line of authorities.

When The Central Land Company made the deed to the *feme* defendant, it was delivered to the plaintiff by the consent of the defendants, to be held by the plaintiff as collateral security for the money that plaintiff agreed to furnish the *feme* defendant to build a house on the lot, and, when this was paid, to be delivered to her. This was a parol declaration of a trust accompanying the transmission of the legal title, and not subject to the Statute of Frauds. *Sherrod* v. *Dixon*, 120 N. C., 60; *Shelton* v. *Shelton*, 58 N. C., 292. And the *feme* defendant took the title subject to this trust. She never has had the title to this lot except with this incumbrance upon it. The plaintiff is the holder of the deed, the legal title, though not the legal owner of the lot, under a parol trust in its favor to the extent of its debt. And in this way, it has such an interest as equity will enforce.

The *feme* defendant in her answer invokes the aid of "equity" and asks that the plaintiff be decreed to deliver this deed to her. "Those who ask equity must do equity." The *feme* defendant does not own, and never has owned, this lot except with this encumbrance upon it. She never has paid a dollar for it and does not propose to do so, and we are unable to see in what her equity consists. To grant this prayer, it seems to us, would be to do a very inequitable thing, and would be such a decree as we have no warrant for making.

This Court has ever been careful to protect the estates of married women against the machinations and frauds of their husbands and others. But it cannot assist a married woman to practice a fraud by which she will acquire an estate, for which she has not paid and does not propose to pay a dollar. The judgment below must be affirmed.

Affirmed.

W. L. CECIL v. W. F. HENDERSON.

Action on Note—Surety—Statute of Limitations—New Promise —Request not to Sue—Promise not to Plead Statute—Issues.

1. In the trial of an action it is only necessary to submit such issues as arise out of the pleadings *material to be tried* and such as will admit all material evidence upon the whole matter in controversy.

2. Where, in the trial of an action which was barred by the Statute of Limitations unless the bar was repelled by an alleged promise of defendant that he would not plead the Statute of Limitations if suit was forborne, (about which there was conflicting evidence), the Court submitted issues as to whether, within three years before commencement of the action, the plaintiff was induced to delay suit on the note at the special request of defendant for the accommodation and upon the promise of the defendant to pay the same and that he would not avail himself of the Statute of Limitations, it was not error to refuse to submit an issue tendered by the defendant as follows: "Is the plaintiff's action barred by the Statute of Limitations?"

3. Although Section 172 of *The Code* renders invalid a new promise to take the case out of the bar of the Statute of Limitations unless the new promise is in writing and signed by the party to be charged therewith, yet, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the Statute of Limitations, this Court, in the exercise of its equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing.

CIVIL ACTION, tried before *Coble, J.*, and a jury, at Fall Term, 1897, of DAVIDSON Superior Court. There was a verdict for the plaintiff on the issues referred to in the opinion of this Court and defendant appealed from the judgment thereon.

Mr. S. E. Williams, for plaintiff.
Messrs. Walser & Walser, for defendant (appellant.)

FAIRCLOTH, C. J.: This is an action on a sealed note executed by Loftin as the principal and the defendant as the surety, commenced on August 1, 1895. The note is dated September 15, 1888, on which the last payment was made November 2, 1891. The Court submitted these issues:

1. "Was the plaintiff induced to delay suit on the note at the special request of defendant for the accommodation and upon the promise of the defendant to pay the same and that he would not avail himself of the Statute of Limitations?" The jury answered "Yes."

2. "Was said request and promise made in 1893 as alleged?" The answer was, "Yes."

The defendant tendered this issue: "Is the plaintiff's action barred by the Statute of Limitations?" which was not submitted, and the defendant excepted. There is no plea of payment; on the contrary, the answer admits that nothing has been paid, except all interest to November 2,

1891. The issue tendered by defendant was unnecessary and its refusal was not error, because the facts show and the issues submitted assume that the right of action was barred, unless it was saved by the request and promise made in 1893, as found by the jury, about which there was conflicting evidence. It is only necessary to submit such issues as arise out of the pleadings *material to be tried*, (*Code*, Section 395), such as will admit all material evidence upon the whole matter in controversy. *Albright* v. *Mitchell*, 70 N. C., 445; *Tucker* v. *Satterthwaite*, 120 N. C., 118.

To repel the State of Limitations, there must be proof of a promise to pay, and when there is an acknowledgment of a subsisting debt the law implies a promise to pay unless there is something to rebut the implication. *McRae* v. *Leary*, 1 Jones, 91; *Smith* v. *Leeper*, 32 N. C., 86. Where the action is upon the original promise, as it must be, the new promise repels the effect of the Statute in "Actions on Promises," and either revives the first or is evidence of similar continued promises from the time of the original contract. The liability of the promisor according to the tenor of the instrument is the consideration for the new promise which must be *between the two parties to do the same thing*, as a promise to a former holder or a third party would not repel the Statute. In a certain class of promises the action must rest upon the new promise, as if the new agreement was to deliver a horse to satisfy an old debt, or if the debt was due the testator and the new promise is made to his executor. *Thompson* v. *Gilreath*, 48 N. C., 493; *McRae* v. *Leary*, *supra*. In *McCurry* v. *McKesson*, 49 N. C., 510, the new promise was "that he would settle and make all right;" *Held*, that repelled the Statute.

Such are the rules at law established by this Court, but the Court in the exercise of its equitable jurisdiction held that when suit was delayed and induced by the request of the debtor, expressing or implying his engagement not to plead the lapse of time in bar of the action, he would not be allowed to set it up as a defence, because it was an unconscientious defence, and against equity. This is easily so in a system where the distinction between actions at law and suits in equity and the forms are abolished and only one form is allowed as it is with us. *Daniel* v. *Commissioners*, 74 N. C., 494; *Haymore* v. *Commissioners*, 85 N. C., 268. *The Code*, Section 172, introduced another requisite in order to avoid the Statute of Limitations, *viz:* that no acknowledgment or promise shall be received as evidence of a new or continuing contract . . . unless the same be contained in some writing signed by the party to be charged thereby.

In the case before us, neither the request for delay, nor the acknowledgment, nor the promise to pay, and that defendant would not avail himself of the Statute of Limitations, was in writing signed by the defendant. In considering that Section of *The Code*, this Court held, in the exercise of its equitable jurisdiction, that a plea of the Statute of Limitations would not be allowed as a defence when it would be unconscientious and inequitable and would perpetrate a fraud on the creditor, in the face of such promises, although they were not in writing. *Joyner* v. *Massey*, 97 N. C., 148; *Hill* v. *Hilliard*, 103 N. C., 34; Wood on Limitations (Second Edition) 228, Section 76. Under the issues submitted the defendant was at liberty to make any defence which could avail him on the trial of the matter in controversy, and the issue tendered by him was unnecessary.

Affirmed.

CLARK, J., concurring in result: *The Code*, Section 172, renders invalid a new promise to take a case out of the bar of the Statute of Limitations unless the new promise is in writing and signed by the party to be charged therewith.

It has been held, however, that where a creditor has delayed to bring action at the request of the debtor, who promised to pay the debt and not avail himself of the plea of the Statute, it would be against equity and good conscience to permit him to plead it and that the creditor can bring his action within the statutory time after such promise and request for delay. *Joyner* v. *Massey*, 97 N. C., 148; *Barcroft* v. *Roberts*, 91 N. C., 363; *Haymore* v. *Commissioners*, 85 N. C., 268; *Daniel* v. *Commissioners*, 74 N. C., 494. It is essential, however, not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the Statute if delay is given. *Hill* v. *Hilliard*, 103 N. C., 34. In the present case, the jury found that state of facts and the action was begun within three years after the indulgence granted at the request of the debtor and his promise not to plead the Statute.

LEMIRA MAYBERRY, et al., v. ALVIN MAYBERRY, et al.

Action to Recover Land—Arbitrators—Award—Validity of Award.

1. Arbitrators need not go into particulars and assign the reasons upon which their award is based.
2. While corruption is good ground for setting aside an award, a mistake of fact is not, unless the arbitrators have made it through undue influence or the fraud of a party.
3. Where a controversy was submitted to arbitration and the arbitrators made their award by a simple announcement of the result, without stating their reasons or the law governing them in their finding, and there was no proof that undue influence was brought to bear upon them or that any evidence was excluded; *Held*, that the award is conclusive upon the parties and will not be set aside.

CIVIL ACTION to recover land, tried before *Greene, J.*, and a jury, at Spring Term, 1897, of WILKES Superior Court.

There was a verdict for the plaintiff and from the judgment thereon defendants appealed.

Messrs. W. W. Barber and *Glenn & Manly*, for defendants (appellants).

No counsel *contra*.

FAIRCLOTH, C. J.: This is an action for the possession of land. The defendants pleaded in bar of the action an arbitration and award between the same parties touching the same subject matter. The controversy involved the boundary line between the parties, and that turned upon the question whether the corner was a hickory or a post oak. The evidence was that the arbitrators examined every witness tendered and received every deed offered by either party, both parties being present at the hearing. The award made in 1889 was "that said arbitrators did settle and locate the line in dispute, and by location of said line by the arbitrators the land described in the complaint does not fall on plaintiffs' side of the line but is on defendants' side," and the report of the arbitrators is made a part of this answer and is pleaded in bar of the plaintiffs' right to recover.

The plaintiffs moved to set aside the award in order that they might introduce another deed which they alleged would throw light on the contention, and insist that it would have caused a different award to have been made. There is no evidence that it would have produced such a result. There is no evidence of fraud or collusion on the part of the arbitrators

The defendants asked the Court to instruct the jury "that there is no evidence in this case on the part of either plaintiffs or defendants that the arbitrators refused to examine any witness or deed offered by either party, and this being so and there being no evidence of fraud on their part, their decision is binding on the parties and the jury should answer the issue No." The refusal of this prayer was error. His Honor among other things told the jury that "If they should be satisfied that there was such a deed (that would have thrown light on the contention) in existence and it was not before the arbitrators, they should find the issue Yes." That was erroneous. The issue was in these words: "Was the award set up in defendants' answer improperly and unlawfully made?" and was answered "Yes."

Trials by arbitration are favored by the law and the Courts, because they are speedy and save costs, untechnical and easily adapted to the minds of laymen. "Arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigations." *Patterson* v. *Baird*, 42 N. C., 255; *Blossom* v. *VanAmringe*, 63 N. C., 65. Arbitrators are a law unto themselves and may decide according to their views of justice, but if they undertake to make the case turn upon matters of law, and mistake the law, and that appears upon the face of the award their award is void and may be disregarded. *Leach* v. *Harris*, 69 N. C., 532; *Henry* v. *Hilliard*, 120 N. C., 479; *King* v. *Neuse Manufacturing Co.*, 79 N. C., 360. An award speaks for itself and is not open to proof of the "*understanding*" of the arbitrators as to its effect. *Scott* v. *Green*, 89 N. C., 278. Corruption is good ground for setting aside an award, but a mistake is not, unless the arbitrators have made it through undue influence or the fraud of a party. *Patton* v. *Garrett*, 116 N. C., 847.

These principles have been so often announced by this Court, they might now be considered *familiar* learning. In the present case, there being no evidence of undue influence, nor that any evidence was excluded, and the award being a simple announcement of the result, without stating the reasons or the law governing the arbitrators, the award must be held conclusive and binding on the parties.

Reversed.

ANNA STAMPER v. MARY STAMPER et al.

Action for Specific Performance—Covenant to Reconvey—Consideration—Default—Equitable Relief—Quantity of Interest—Survivorship—Waiver.

1. Where a contract relating to land is not objectionable legally, it is as much a matter of course for a Court of Equity to decree specific performance as it is for a Court of Law to give damages for breach of such contract.
2. Where a father made a conveyance of lands to his son in consideration of the comfortable support of himself and wife during their natural lives, in default of which the grantee covenanted to reconvey; *Held*, that the grantor and his wife had the right to demand a reconveyance, on breach of the covenant, in entirety, with right of survivorship.
3. In such case the fact that, after the grantor's death, his wife allowed the grantee, her son, to return home after a term of outlawry and imprisonment, and live with her on the land until his death, was not a waiver of her right to a reconveyance.

CIVIL ACTION, tried before *Norwood, J.*, and a jury at Spring Term, 1896, of ALLEGHANY Superior Court. After the evidence was closed his Honor expressed the opinion that the plaintiff could not recover, whereupon she submitted to a non suit and appealed.

Messrs. Hackett & Hackett, for plaintiff (appellant.)
Messrs. R. A. Daughton and *W. J. Peele*, for defendants.

DOUGLAS, J.: This was a civil action brought by the plaintiff, widow of Hiram Stamper, to enforce the reconveyance to her by the heirs-at-law of Milton Stamper of certain lands in accordance with the provisions of a bond executed by the said Milton Stamper on the 18th day of July, 1873, the condition of which is as follows: "The said Milton Stamper is to comfortably support and maintain at his expense, upon the said land, the said H. H. and Anna Stamper, during their natural lives, and upon default so to do is to reconvey the land above referred to to the said H. H. and Anna Stamper." The deed conveying to Milton Stamper the land referred to in the bond and fully described in the deed states as its consideration: "That for and in consideration of love and affection and the further consideration of an obligation this (day) given by the said Milton Stamper to the said H. H. Stamper for the support of the said H. H. and Anna Stamper, and to which bond reference is hereby given for a more specific explanation of its terms." The deed further says in the *habendum:* "To have and to hold to him the said Milton Stamper, his heirs and assigns forever, free and clear from any and all incumbrances whatever, except those set forth in the bond above referred to, &c."

Upon the conclusion of the plaintiff's testimony, his Honor intimated that upon the plaintiff's own showing he would instruct the jury, that, if they believed the testimony, they would find in favor of the defendants. Upon which intimation the plaintiff submitted to a non suit and appealed.

In this intimation we think there was substantial error. There was direct and positive testimony introduced by the plaintiff tending to show that Milton Stamper failed to comply with the conditions of the bond. If he so failed, we think the plaintiff is entitled to a decree for specific performance of the covenant in the bond and a reconveyance of the land. Witnesses testified, among other things, that Milton Stamper committed some crime, admitted by the counsel to be homicide; that he lay out in the woods for two years and was then sent to the penitentiary where he remained four or five years, during which time he contributed nothing to the support of his mother; that after the expiration of his sentence he came home where he remained and worked until his death; and that he was taken care of in his last illness by his mother, the plaintiff, and his sister, Mrs. Hall. Surely, if the jury believed this evidence, and it must be taken in the light most favorable to the plaintiff, they could not find that Milton Stamper had complied with the conditions of the bond, as he had neither supported his mother nor reconveyed the land. If his Honor meant that the plaintiff could not recover as matter of law, then we think there was equal error. The subject matter was land, and the bond plainly provided for a reconveyance in case of default. While it is universally conceded that specific performance is a matter of discretion, the best authorities agree that, where a contract relating to land is not objectionable legally, it is as much a matter of course for a Court of Equity to decree specific performance as it is for a Court of Law to give damages for a breach thereof. Story Equity Jur., Section 751; Bispham Equity, Section 364; Pomeroy Equity, Section 1402; *Kitchin* v. *Herring*, 42 N. C., 190.

It is urged that this case is in the nature of a forfeiture for breach of condition subsequent, which is not favored by the law, and that damages would be the proper relief. Even if this were so, the parties to the contract themselves agreed upon a reconveyance, which in that view would be in the nature of liquidated damages. But the relief sought here is purely equitable and must be administered upon equitable principles.

We must now consider the quantity of interest to be reconveyed, which we think is the entire estate in the land acquired by Milton Stamper under the deed. The covenant was to reconvey to H. H. and Anna Stamper. They being husband and wife held their equitable interest, the right to demand a reconveyance upon breach of the covenant in entirety, with the right of survivorship. *Motley* v. *Whitemore*, 19 N. C., 537; *Todd* v. *Zachary*, 45 N. C., 286; *Woodford* v. *Higly*, 60 N. C., 237; *Long* v. *Barnes*, 87 N. C., 329; *Jones* v. *Potter*, 89 N. C., 220; *Simonton* v. *Cornelius*, 98 N. C., 433. In the two cases last cited the land held in entirety was a life estate, and we do not see why the right to the conveyance of a fee simple cannot be held in the same manner. In *Laxton* v. *Tilly*, 66 N. C., 327, where the support of the plaintiff was held a charge upon the land in accordance with the prayer of the plaintiff, there was no agreement to reconvey the land nor was a reconveyance asked by the plaintiff. In the case at bar the plaintiff asked only what the defendants' intestate agreed to give, that is to give back the land upon breach of the covenant, which was simply a failure of consideration. There can be no doubt that Hiram Stamper appropriated this land to the support of himself and his wife in their old age and that he intended to take back the land upon any breach of the agreement, so that the land might do what the son had failed to do.

Every rule of construction, save one, is properly invoked to carry out the evident intention of the grantor, and that rule has no application here. This single exception is the rule in Shelly's Case, the Don Quixote of the law, which, like the last Knight errant of chivalry, has long survived every cause that gave it birth and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous.

The death of Hiram Stamper vested the entire equitable estate in his wife Anna Stamper, the plaintiff in this case.

But it is said that the plaintiff waived the forfeiture. How and when? When Milton Stamper came back from the penitentiary, she let him live with her until he died, and took care of him in his last illness. Though a convict, he was her son; and because she opened her door to her homeless child, must we presume a waiver? As she sat by his death-bed, cooling the fevered brow and soothing the troubled spirit through the long dark hours of night into the dawn of another day and another life, can we suppose that she was contemplating the legal effect of her act? The holiest instincts of humanity should not be construed to their own prejudice, and we need not seek a motive for a mother's love, the only *infinite* attribute of a *finite* being. This is not mere sentiment. It is the answer of the conscience of a chancellor on an appeal to the discretion of a Court of Equity.

It is alleged by the defendants that the plaintiff is endeavoring to obtain title to this land for the purpose of devising it to her daughter, Parmelia Hall. Be it so. If the land belongs to the plaintiff, why can she not give it to whom she pleases, and why should not she give it to one who, alone of all her children, has remained with her?

For the reasons given we think there was error in the intimation of his Honor and that a new trial should be ordered.

New trial.

L. L. PURYEAR et al., Administrators of Isaac Jarratt, v. J. C. LYNCH, Administrator of Elizabeth Lynch, et al.

Practice—Divided Bench—Affirmation of Judgment Below.

When, for any reason, one of the five members of this Court does not sit and the Court is evenly divided on the hearing of an appeal, the judgment below will be allowed to stand not as a precedent but as the decision in the case.

SPECIAL PROCEEDING begun before the Clerk of the Superior Court of Yadkin County by petition for the sale of land of Elizabeth Lynch, deceased, for assets to pay a judgment which plaintiffs had recovered in 1888 against the administrator of intestate, heard before *Starbuck, J.*, at Spring Term, 1897, of YADKIN Superior Court. The defendant administrator had delayed or refused to have the land sold (being the only land owned by intestate) and in bar of plaintiff's action pleaded the seven and ten years statutes of limitation, the defendant administrator having qualified and made publication of notice, &c., in July, 1883. A jury trial was waived and his Honor upon the pleadings and facts agreed gave judgment for plaintiffs and defendants appealed.

Mr. E. L. Gaither, for plaintiffs.
Mr. A. E. Holton, for defendants (appellants).

Per Curiam: In this case Justice Furches did not sit, and the Court is evenly divided. The practice of appellate Courts in such cases is that the judgment below stands, not as a precedent, but as the decision in the case. *Durham* v. *Railroad*, 113 N. C., 240, and authorities there cited.

Affirmed.

C. J. SHOAF & CO. v. E. FROST.

Homestead—Valuation of Jury—Reallotment—Evidence.

Where, upon exception to a homestead allotment, the value of the property in question was fixed by a jury, and an order was made by the judge for a re-allotment in accordance with the jury's valuation; *Held*, that upon plaintiff's exception to the Commissioners' report of the second allotment which was not in accordance with the jury's valuation, it was proper to sustain the exception and to order a new allotment, and in such case evidence as to the considerations which influenced the jury in making its valuation was not admissible.

This was an appeal from an order of *Starbuck, J.*, at Fall Term, 1897, of Davie County, sustaining an exception to the allotment of homestead Commissioners and ordering a new allotment. The facts appear in the opinion.

Messrs. Watson, Buxton & Watson, for plaintiffs.
Messrs. Glenn & Manly, for defendant (appellant).

FAIRCLOTH, C. J.: Under proper proceedings appraisers were appointed to lay off the defendant's homestead, which they did, describing the assigned premises by metes and bounds, and valued the same at $1,000. The plaintiffs excepted to the appraisers' return and a jury trial was had under *The Code*, Sec. 519, and the amendatory Act of 1885, Chapter 347, and in response to the issues they found as a fact that the land allotted as aforesaid was worth $2,000. An appeal was taken and this Court held that the valuation fixed by the jury was final, and the commissioners appointed to make a second allotment, in accordance with the verdict of the jury, must be guided by that valuation, and that the commissioners must be appointed by the Court and summoned by the sheriff. *Shoaf* v. *Frost*, 116 N. C., 675. At Fall Term, 1895, the Judge presiding, after said verdict was entered, set aside the first allotment and appointed commissioners to make a new allotment, in accordance with the verdict of the jury fixing the value of said property. The commissioners viewed and valued said homestead premises, less the store house and lot cut off, at $1,000 and filed their report. The plaintiffs again excepted, and his Honor at Fall Term, 1897, heard the exceptions, evidence offered and argument, and found as a fact that the storehouse and lot cut off are worth about $400 and of much less value than the remainder of the original homestead as allotted. He, thereupon, set aside the report of the commissioners and appointed another commission to reappraise said homestead, and directed them to divide the land and improvements, theretofore allotted by the Sheriff's appraisers, into two parts of equal value, and assign to the defendant as his homestead one part selected by him, so as not to embrace more than one half in value of the whole.

From this judgment the defendant appealed, having filed affidavits before the Judge tending to show the value of the homestead, the considerations which influenced the jury and the value of the part cut off, &c. This evidence is not available on the question now before us.

The order of his Honor is agreeable to the decision heretofore made by this Court, where the reasons for the decision are stated, and we see no error.

If appreciation or depreciation in the value of the homestead has occurred in the meanwhile, there is a remedy, as pointed out in *Vanstory* v. *Thornton*, 110 N. C., 10.

Affirmed.

T. L. PATTERSON v. J. W. MILLS et al.

Action to Foreclose Mortgage—Parties—Issues—Prior Deed Unregistered—Connor's Act—Constructive Notice—Practice.

1. Where, in a proceeding to foreclose a mortgage, a person who claimed under a deed antedating the mortgage but not registered until after the commencement of the action, was made a party, the rights of such person were not affected by the fact that an heir of a deceased co-grantee in such deed was not also made a party and an exception to the proceeding on that ground is untenable.
2. Where, in the trial of an action, the issues settled by the Court are such as to enable each party to have every phase of his contention presented, or if the issue submitted is the only one raised by the pleadings, this Court will not declare error either as to the form or number of the issues submitted.
3. Possession to constitute notice must be open, notorious, exclusive and

existing at the time of the purchase by the party to be affected thereby.

4. Where one of the defendants in an action to foreclose a mortgage claimed under a deed from the mortgagors, (her brothers) antedating the mortgage but not registered until after the commencement of the action and on the trial it appeared that the mortgagors had owned and cultivated the land; that there was no house or fence on the land; that, after the date of the unregistered deed in question to their sisters, they continued to cultivate it and exercise the same ownership as before and continued to list it for taxation in their own names and that they and their sisters lived in a house on an adjoining tract: *Held* that such acts were not inconsistent with the paper title nor did they show exclusive, open and notorious possession in the sisters or actual possession by them.
5. It cannot be assumed that an assignment of error is a correct statement of the facts therein recited when such facts do not appear in the case stated by the trial Judge.
6. An omission to charge on a particular point is not error when no special instruction was asked thereon.

CIVIL ACTION to foreclose a mortgage tried at February Term, 1897, of IREDELL Superior Court before *Starbuck, J.*, and jury. The note and mortgage were executed by defendants G. F. and J. W. Mills to T. A. Patterson on the 23rd day of January, 1884, and recorded in Iredell county on the 13th of March, 1884. Patterson died in the year 1888 and his administrator assigned said note and mortgage to plaintiff on January 28th, 1891. There was no controversy as to the amount due on note and mortgage.

Defendant Sarah Mills an unmarried sister of defendants, G. F. and J. W. Mills, the mortgagors, claimed title to the land in controversy with the heirs at law of a deceased sister, under an unregistered deed executed by J. W. and G. F. Mills, her brothers, with whom she and her sister lived. This deed bears date 1878 and was registered January 1, 1896, after the commencement of this action, the said Sarah alleging notice on the part of said mortgagee of her said deed and also alleging possession and occupancy by her and her said sister of said land.

Defendants tendered following issues: 1. At the time of the execution of alleged mortgage, were Sarah Mills and Mary Mills the owners of the land? 2. At the time of the execution of said mortgage was defendant Sarah in the actual possession of the land? 3. Did plaintiff's intestate and plaintiff have knowledge of defendant's claim at the time of execution of the mortgage? The Court declined these issues, being of opinion that the matters embraced in them could not be presented, &c. Defendants excepted. The Court settled as follows the issues, to which there was no exception: 1. What amount if any is due on plaintiff's mortgage? Answer (by consent) $———. 2. Is the unregistered deed set up by Sarah Mills and others void as to the plaintiffs?

Plaintiff introduced in evidence the note and mortgage bearing date January 23, 1884: executed by G. F. and J. W. Mills to T. A. Patterson, registered 13th March, 1884.

J. M. Patterson testified: "The amount of the debt was $222.45 at 8 per cent. payable to T. A. Patterson, now dead. I am his administrator. I assigned mortgage to T. L. Patterson on 28th January, 1891. He is now the owner of it. I was agent of my father T. A. Patterson when note and mortgage were executed in 1884. Had no knowledge at that time that Sarah Mills had a deed or any claim upon the land. Never heard of her claim to this land till after this suit was instituted. In 1886 she and her brother gave me an indemnity mortgage on 3 tracts including this tract and the home place tract and she then told me she had no interest in any of the land except the home place." The indemnity mortgage referred to by this witness was particularly described by the next witness T. L. Patterson, who testified: "I never heard of the claim of Sarah Mills until after I advertised the lands for sale under the mortgage. All the defendants G. F., J. W. and Sarah lived together on the home place which is a tract adjoining that in controversy, and have lived there that way before and after the execution of the mortgage. J. W. and G. F. Mills have been in possession of the land ever since. Have known they worked and cultivated the land. They told me they owned it. They all lived together on the home place, a different tract from the one mortgaged. There is no house on the land mortgaged and no fence around it. I never heard of Sarah's claim until ten days after I advertised it for sale under the mortgage, which was perhaps a month before I brought this suit." On cross examination: "J. M. Patterson and I went security for G. F. and J. W. Mills in 1886 for their appearance at Court and they executed a mortgage upon three tracts of land—the home place, the land in controversy, being a 54 acre tract, and another tract of 84 acres, to indemnify us. G. F. and J. W. and Sarah all signed the mortgage. Sarah said at this time that she had no interest in any of the land except the home place, which was also included in the mortgage. All the defendants lived together on the home place and all were and are unmarried."

Defendants introduced following evidence: Deed executed by G. F. and J. W. Mills to Sarah Mills and Mary Mills dated July 17, 1878, conveying land in controversy, proved July 17, 1878, and registered January 1, 1896. Sarah Mills testified: Am sister of J. W. and G. F. Mills—live six miles from T. L. Patterson—four of us are all living together—sister Mary died leaving no children—I have been in possession of the 54 acre tract since 1878. When I got the deed the 54 acre tract and 80 acre tract, where we live, were all one plantation. I have been cultivating it. I had my brothers to cultivate it for me. I have worked in the field myself. I was present and had my deed when the mortgage was drawn up August 11, 1886, (the indemnity mortgage). J. M. and T. L. Patterson were there. J. M. Patterson drew it up. Don't know that anything was said why I signed it. We paid our brothers $800 for the land. My brother bought the 54 acre tract, the land in controversy, from Mr. Little—we helped to pay for it—they borrowed the money from us to pay for it and gave us notes, as they could not pay us back and we wanted our money, they made us the deed. I rented the land to my brothers for 50 dollars a year. And they worked and cultivated the farm and made sub-rental contracts for part of it. My brothers and I have all been living together all our lives. We rented the land to our brothers ever since 1878. I worked some in the crops. Brothers had control of the farm. When I worked I did so of my own accord and to help them. We all lived on the home place—no difference in our way of living before and after the deed, or in the management of the farm except that they paid us rents."

James Mills testified: "Am brother of Sarah. She has owned and controlled the land since 1878. I was present when the indemnity mortgage to James and Thomas Patterson was made in 1886. This 1878 deed was there. James got the boundaries from it. Nothing said about why my sister signed the mortgage—Patterson would not take it without her signing. In 1886 I told Thomas Patterson that my sister had some interest in the 54 and 82 acre tract. I was trying to borrow money. My brother and I have cultivated the land all the time—paid our sister $50 a year rent. At the time the indemnity mortgage was given, nothing was said to Thomas Patterson about sister's interest in the land. I told J. and T. Patterson when I executed the mortgage in 1884 that I had no interest in the land but that it belonged to sister. T. Patterson requested me to keep it a secret. There is a house on the 54 acre tract which is known as the home place—the land in controversy joins the home place." On cross examination the witness said: "No house on the mortgaged land, no one living on it, no fence around it and no natural boundaries. My brother and I cultivated and managed the mortgaged land after the deed to Sister just as we did before, except that we paid rent to sister. We returned it for taxation in our names all the time before and since the deed, but sister furnished the money to pay taxes since the deed. All four of us are single and live together as one family on the home place."

George Mills testified in his own behalf: "Thomas Patterson came to my house and asked us to give the mortgage. We executed deed in 1878 to sisters for $800 and then rented the land from them at $50 a year. Sarah has been in possession since 1878. The Pattersons knew of this deed made in 1878." On cross examination: "We all lived together on the home place. My brother and I managed and cultivated the land since 1878 the same as we did before, except we paid rent."

T. L. Patterson being recalled said: "There was nothing said to George and James Mills about keeping it a secret. Neither one of them ever told me that their sisters owned the land." J. M. Patterson recalled: "Neither my father nor myself knew of Sarah's deed at the time the mortgage was made—none of them ever told me that their sister had any claim on the land."

After the conclusion of testimony his Honor stated that he would only submit to the jury the question whether J. M. Patterson the agent of T. A. Patterson, the mortgagee, and T. A. Patterson himself had notice of the deed from G. F. and J. W. Mills to Sarah and Mary Mills, or their claim of ownership at or before the execution of the mortgage to T. A. Patterson in 1884. Defendant Sarah Mills excepted for that (1) That, if at the time the mortgage was executed by G. F. and J. W. Mills to J. M. Patterson agent, said

J. M. Patterson was informed of the rights of Sarah and Mary in the land and took the mortgage under these circumstances then the mortgagee took with notice of the claim of Sarah and Mary. (2) That T. L. Patterson in taking an assignment of the past due note of his father took the same subject to the equities of Sarah and Mary as against T. A. Patterson. (3) That if Sarah and Mary had an unregistered deed made in 1878 from G. F. and J. W. Mills to the land in dispute and have remained in possession ever since, this is notice to plaintiff and those under whom he claims, and their deed must prevail against plaintiff's mortgage, and the possession of Sarah and Mary and their exercising right of ownership over the land since 1878 renting the same to their brothers and claiming the same under the unregistered deed was notice to T. A. Patterson and also to T. L. Patterson. (4) If plaintiff had been informed of the claim of Sarah and Mary in the land by G. F. and J. W. Mills at and before he took the assignment of the note and mortgage, then he took the same with notice and subject to the unregistered deed.

The Court gave the first instruction and declined to give the 2nd, 3rd, and 4th—holding that from all the testimony, the character of the possession of Sarah in connection with her brothers, was not sufficient evidence to go to the jury upon the question of constructive notice. Defendant excepted. The Court among other things charged that, under the registration laws, the deed to Sarah and Mary was void as against the mortgage to Patterson, unless Patterson or his agent, at or before the execution of the mortgage, had knowledge that Sarah and Mary had a deed to or claimed to own the land; that it made no difference whether Patterson acquired knowledge of Sarah's claim at the time the indemnity mortgage was given, for the reason that the mortgage under which plaintiff claimed had already been executed.

As to the burden of proof the Court charged that it was upon the defendant Sarah to prove by preponderance of evidence that Patterson himself or his agent had knowledge of her claim of ownership at or before the execution of the mortgage." (Only so much of the charge as is pertinent to defendant's exception has been set out).

There was a verdict for plaintiff, motion by defendant for new trial to bring in other parties: "1. For that all the parties in interest are not before the Court, as it appears from the record that at a former term it was made to appear that one Margaret A. Smallman was an heir at law of Mary Mills, deceased, and that she is a minor and has not had a guardian *ad litem* appointed to represent her in this action as required by law. 2. For that the Court failed to instruct the jury that if Sarah and Mary had deed made to them in 1878 and remained in possession of the land ever since, exercising rights of ownership over it, such possession being open and notorious, such possession is notice to plaintiff and to those under whom he claims, and the deed to Sarah and Mary although unregistered must prevail against the mortgage under which plaintiff claims, and should find the issue in favor of defendant. 3. For that the Court should have charged, as asked by defendant, that Patterson in taking an assignment of the past due note declared on, made to his father by James and George Mills, took the same subject to equities of these defendants, and should answer the issue submitted on this ground in favor of defendants. 4. For that the instructions as given are erroneous for failing to give the instructions as above set forth, and also in this, *to-wit* (a) It states that the unregistered deed set up by Sarah and Mary is void as against the mortgage of plaintiff. (b) It states that it makes no difference whether any notice was given at the time the indemnity mortgage was given, because at the time it was executed this mortgage had already been made. The defendants contend that the evidence relating to the circumstance connected with the indemnity mortgage tended to fix J. M. Patterson, the acknowledged agent of T. A. Patterson, with knowledge of the title to the land in these defendants. 5. For that the Court failed to submit the issues tendered by defendant. 6. For that the Court instructed the jury that the burden was on defendant upon the one issue submitted to the jury involving matters of fact alleged by plaintiff and expressly denied by defendants. 7. For that the Court erred in submitting the one issue which was submitted." Motion for new trial denied and defendants excepted and appealed from the judgment rendered.

Messrs. Armfield & Turner, for plaintiff.
Messrs. Long & Long, for defendants (appellants).

CLARK, J.: This proceeding is to foreclose a mortgage which was executed and recorded in 1884. Sarah Mills is brought in as a defendant because she claims under a deed dated in 1878, but which remained unregistered till July 1896, after this action was begun. There is nothing in her exception that one of the heirs at law of her deceased sister, who was named as grantee with her in the unregistered deed, is not made a party. Sarah Mills is not interested in that, in any way, as her rights cannot be affected thereby.

Every phase of the defendants' contention could have been, and was presented on the issue as settled by the Court, and, when this is so, we will not find error as to the mere form or number of the issues submitted. *Rittenhouse* v. *Railway*, 120 N. C., 544; *Humphrey* v. *Church*, 109 N. C., 132; *Denmark* v. *Railroad*, 107 N. C., 185. Besides, the issue submitted was the only pertinent one raised by the pleadings. Issues upon mere evidential matters should not be submitted. *Grant* v. *Bell*, 87 N. C., 34; *Patton* v. *Railroad*, 96 N. C., 455.

Had the unregistered deed been executed since Chapter 147, Acts 1885, known commonly as "Conner's Act," no notice to a subsequent purchaser or mortgagee, however full and formal, would supply the want of registration of the prior conveyance. *Maddox* v. *Arp*, 114 N. C., 585; *Quinnerly* v. *Quinnerly*, Ibid, 145; *Barber* v. *Wadsworth*, 115 N. C., 29; *Hooker* v. *Nichols*, 116 N. C., 157. The unregistered deed, however, is alleged to have been made prior to the Act of 1885, and Sarah Mills contends that she comes within the exception therein that no purchase shall avail as against any unregistered deed executed prior to December 1, 1885, when the person holding under such unregistered deed is in the actual possession of the land, or the purchaser has actual or constructive notice of such unregistered deed. The Court instructed the jury, at defendant's request, that, if the mortgagee when he took the mortgage, had information of the rights of Sarah Mills and her sister, he took with notice. The finding of the jury settles that there was no actual notice, and his Honor properly held that there was no constructive notice. The evidence was that the mortgaged land had no house or fence on it; that the mortgagors, G. F. and J. W. Mills, two brothers owned the premises and cultivated them; that after the date of the deed made to Sarah and Mary Mills, their sisters, the said G. F. and J. W. Mills continued to cultivate and exercise the same ownership thereover as before, and have continually ever since listed the same for taxes in their own names, but they allege that they paid their sisters rent ($50. per annum) and were furnished money by said sisters to pay the taxes. All four were unmarried and lived together in a house on an adjoining tract. There was no actual notice, and herein this case differs from *Cowan* v. *Withrow*, 111 N. C., 306, S. C. 112 N. C., 736, S. C. 114 N. C., 558 and S. C. 116 N. C. 771. Constructive notice is a legal inference from established facts and arises when "the presumption of notice is so violent that the Court will not allow it to be contradicted." *Bost* v. *Setzer*, 87 N. C., 187 and cases cited; Story Eq. Jur. 399; 16 Am. & Eng. Enc. 791. Possession to constitute constructive notice must be "open, notorious, exclusive and existing at the time of the purchase" (*Edwards* v. *Thompson*, 71 N. C., 177; *Bost* v. *Setzer*, *supra*,) and it is not such notice when the grantor remains in possession after the conveyance, or if the possession is equivocal. 16 Am. & Eng. Enc. 803. Here, the alleged grantors exercised the same acts of dominion and ownership, as before, cultivating the land and paying the taxes in their own names, and living with their sisters on an adjoining farm. From this there were no acts inconsistent with the paper title, nor showing "exclusive, open and notorious possession" in the two sisters nor of actual possession by them, even if the evidence of a promise to pay, or payment of rent to them was made. *Allen* v. *Bolen*, 114 N. C., 560. In all the cases in our Courts of constructive notice from possession, the actual possession was in some one else than the vendor. *Johnson* v. *Hauser*, 88 N. C., 388; *Bost* v. *Setzer*, *supra*; *Webber* v. *Taylor*, 55 N. C., 9.

The second prayer for instruction was properly refused. Sarah Mills had no equity in the note sued on and the plaintiff's taking it after maturity in no wise affects her.

The Court properly charged that the burden was upon the defendant, Sarah Mills, to show that the mortgagee had actual or constructive notice of the unregistered deed, so as to entitle her to come within the proviso in the Act of 1885. There was no error in instructing the jury that it was immaterial whether or not the plaintiff received actual notice of the unregistered deed in 1886 which was two years after the mortgage in suit was executed.

The recital in the defendants' exceptions (4 a) as to what the Judge charged is not sustained by what the Judge says was his charge, and goes for naught. As was said in *Merrell* v. *Whitmire*, 110 N. C., 367, citing *Walker* v. *Scott*, 106 N. C., 56, "We cannot assume that an assignment of error is a correct statement of the facts therein recited, when such facts do not appear in the case stated by the Court."

The second exception which was for failure to give a certain instruction, which was not prayed for, cannot be sustained, first, because the possession of Sarah Mills was not shown to be "open, notorious and exclusive" and for the further reason that the omission to charge upon a particular point is not error; if the party desires a specific instruction thereon it is his duty to ask for it. *Boon* v. *Murphy*, 108 N. C., 187; *State* v. *Varner*, 115 N. C., 744; *State* v. *Ussery*, 118 N. C., 1177; *Nelson* v. *Insurance Co.*, 120 N. C., 302; *State* v. *Pritchett*, 106 N. C., 667; *Bethea* v. *Railroad*, Ibid 279; *State* v. *Bailey*, 100 N. C., 528; *King* v. *Blackwell*, 96 N. C., 322; *Willey* v. *Railroad*, Ibid 408; *Morgan* v. *Lewis*, 95 N. C., 296, and numerous other cases cited in Clark's Code (2nd. Ed.) pp. 382, 394 and 399.

Affirmed.

B. F. ELLER, Administrator of Peter Eller, v. A. M. CHURCH.

Action on Receipt—Practice—Trial—Directing Verdict—Statute of Limitations—When Cause of Action Accrues—Revival of Cause of Action.

1. A verdict cannot be directed in favor of the party upon whom the burden of proof rests.

2. The Statute of Limitations begins to run against a cause of action as soon as the plaintiff, being then under no disability, is at liberty to sue.

3. Where an assignee of several judgments against the estate of an intestate received payment thereof from the administrator in August

1881, and covenanted, in the receipt, to refund so much as might be in excess of his *pro rata* share if it should "turn out" that there were debts of superior dignity or lien, or that he had received more than he was entitled to receive; and it appeared on the trial of an action on such covenant that the administrator suffered judgment to be taken against him in 1894 on a justice's judgment rendered against a former administrator of intestate in October 1878; *Held*, (1) that the cause of action on the covenant arising out of the judgment rendered in 1878 accrued as soon as the administrator could reasonably have known of the existence of the judgment, that is, at the date of the receipt containing the covenant to refund: (2) that the action was barred by the statute of limitations and (3) that the cause of action on the covenant arising out of the 1878 judgment was not revived by the act of the administrator in voluntarily allowing judgment to be entered against him in 1894 in an action brought on such judgment after the latter had been barred by the statute of limitations.

CIVIL ACTION tried before *Hoke, J.*, and a jury at Fall Term, 1896, of WILKES Superior Court. There was a verdict for the plaintiff and from the judgment thereon defendant appealed.

Messrs. W. W. Barber and *Glenn & Manly*, for defendant (appellant).

No counsel, *contra*.

DOUGLAS, J.: This was a civil action begun before a Justice of the Peace, and tried on appeal in Superior Court, to recover on the following receipt or contract: "Received of B. F. Eller, Adm'r. d. b. n. of Peter Eller, deceased, the sum of $5.93, $553.80, being payments in full of the principal, interest and costs in the following judgments on the Superior Court docket of Wilkes County, which have been assigned to me (specifying the judgments), the same having been assigned to me, and should it turn out that I have received more than is due me in law, or that there are any prior liens having precedence over the above judgments, then I am to refund to the said B. F. Eller Adm'r. the amount overpaid. Given under my hand and seal this 22nd day of August 1881. (Signed) A. M. Church, seal."

The plaintiff introduced a record of the Superior Court showing a judgment obtained in 1894 against him, as such administrator, by one J. S. Huffman. This judgment was rendered on a former judgment obtained in a Justice's Court in October 1878. To the second action the plaintiff practically made no defense, and allowed judgment to be taken against him for the full amount. In the suit at bar the defendant pleaded the statute of limitations. The case on appeal states that "his Honor instructed the jury that from the evidence introduced the plaintiff was entitled to recover, and the findings of the jury were in accordance with the instructions of his Honor." While this is not very explicit, we presume that his Honor charged the jury that if they believed the evidence the plaintiff was entitled to recover as a matter of law, there being no conflict of testimony. Under no circumstances could he have *directed* a verdict in favor of the plaintiff, upon whom rested the burden of proof. *State* v. *Shule*, 32 N. C., 153; *Spruill* v. *Ins. Co.*, 120 N. C., 141. But, assuming that the charge was free from this objection, we think there was error in his Honor's instruction as to his conclusion of law. The *causa litis* in this action is the covenant of the defendant contained in the receipt of August 22, 1881, above set forth and the statute began to run thereon as soon as it "turned out" that the defendant had received more than was due to him in law, or that there were prior liens. The only construction we can give to the words "turn out" is that they mean when those facts, if existing, were discovered by the plaintiff, or might have been discovered with reasonable diligence. The judgment now set up by the plaintiff was based on a former judgment rendered in October 1878, before the receipt of August 22, 1881 was given. Therefore, the plaintiff could at once have demanded of the defendant the *pro rata* contribution he is now seeking to recover.

It is unnecessary to cite authority to show that the statute begins to run when the plaintiff is at liberty to sue, being then under no disability. More than ten years having elapsed before the bringing of this suit since the receipt was given, and after the plaintiff could have ascertained with reasonable diligence the existence of the outstanding debt now set up, his action is barred by the statute of limitations.

The fact that he voluntarily permitted a judgment to be taken against him in 1894 on a Justice's judgment so clearly barred, does not alter or renew the liability of the defendant, who was a judgment creditor, and neither an heir nor devisee.

Error.

W. C. COWLES, Guardian, v. C. J. COWLES.

Motion to set aside Judgment on Ground of Excusable Neglect—Laches—Irregular and Erroneous Judgments—Judgment by Default Final—Money paid for use and Benefit of Defendant—Implied promise to Repay.

1. Where a judgment by default final was rendered against a defendant who had employed an attorney but had neither attended Court nor given any excuse for his absence and had given his attorney no information upon which to interpose a defence; *Held*, that his conduct was inexcusable negligence which did not entitle him to have the judgment set aside under Section 274 of *The Code*.

2. The refusal of a motion to set aside a judgment on the ground of surprise or excusable neglect is a matter of discretion with the Judge below and cannot be reviewed on appeal unless it should appear that such discretion was abused.

3 Where, in an action to recover money expended by plaintiff mortgagee for the benefit of defendant mortgagor, the verified complaint

alleged a certain sum to be due from defendant to plaintiff on the implied promise to repay and no answer was filed, it was proper to render a judgment by default final. (Montgomery, J., dissents).

4 If, in such case, on the facts stated in the complaint, the law did not raise an implied promise to repay, the judgment would be erroneous and not irregular and another Judge at a subsequent term would have no right to correct or set it aside.

Motion in the cause heard before *Starbuck, J.*, at July Term, 1897, of Alexander Superior Court, made by defendant Calvin J. Cowles, to set aside the judgment by default rendered against him at January Term, 1897, in so far as it included the sum of $125.85, with six per cent. interest thereon from February 17th, 1897, the judgment having been, by consent, upon motion of defendant, Ida A. Cowles, reformed as to both defendants, in so far as it declared a lien upon the lands. The purpose of the motion was to set it aside in so far as it was a personal judgment against defendant Calvin J. Cowles, for the said sum of $125.85, and interest.

The Court found the following facts:

The summons was duly served on Calvin J. Cowles, returnable to January Term, 1897. Plaintiff filed verified complaint within first three days of term. No answer was filed.

Defendant Calvin J. Cowles, a resident of Wilkesboro, was prevented by illness from attending at said term, but was represented by counsel who was present. Defendant did not inform his counsel as to the cause of his absence or as to the ground of his defence, but wrote a letter, simply stating that it was impossible for him to attend, and requested counsel to have case continued at said term.

Plaintiff's counsel moved for judgment by default final. Defendant's counsel opposed the motion and requested a continuance, with leave to answer.

Thereupon plaintiff's counsel stated that, if counsel for the defendant would say that his client had a meritorious defence, the request for time to answer would not be opposed.

Defendant's counsel stated he had no information as to the nature of the defence or as to the cause of his client's absence, except such as was contained in the letter.

The judgment which is attacked by this motion was then rendered.

The Court further found that in the action brought by Matheson against defendant C. J. Cowles, mentioned in Article V. of said complaint, H. C. Cowles, the plaintiff in this cause became a party defendant. The Matheson action was tried in Superior Court and judgment rendered in favor of defendants. Whereupon, Matheson gave notice of appeal to Supreme Court. H. C. Cowles believing the appeal would be successful, in order to protect the mortgage security for the debts owing to him by his then co-defendant, Calvin J. Cowles, paid Matheson $158.50, as stated in said complaint. The sum of $32.75, represents the amount of taxes paid by Matheson, including the tax for which the land was sold, and twenty per cent. interest thereon allowed to purchasers at tax sales. This last amount is conceded to be justly owing by Calvin J. Cowles to H. C. Cowles. The residue of said $158.50 was to cover the costs of the suit brought by Matheson, viz., $25.85, and the amount agreed on as a compromise, viz., $100. It is as to these last two items, aggregating $125.85, that defendant Calvin J. Cowles complains and seeks to vacate the judgment by default.

The Court further found that Matheson abandoned his appeal in consideration of the amount so paid him, and that the said compromise was effected without the knowledge or consent of Calvin J. Cowles, and that said amount of $125.85, with interest at 6 per cent. from February 17th, 1894, the date of payment to Matheson, was embraced in the judgment by default. The Court was of the opinion that the judgment which the defendants attacked must have been rendered on the ground that the facts set forth in the complaint raised an implied contract on the part of Calvin J. Cowles to reimburse H. C. Cowles the $125.85, paid by the latter in effecting the compromise. His Honor was of the opinion that the judgment was not irregular, and that the facts did not constitute excusable neglect. He therefore adjudged, not as a matter of discretion but for the reason stated, that the motion be denied, and that plaintiff recover of defendant Calvin J. Cowles his costs of the motion. From this judment the defendant appealed.

Messrs. Armfield & Turner, for plaintiff.
Mr. W. W. Barber, for defendant (appellant).

CLARK, J.: This is a motion to set aside a judgment by default final taken at a previous term. The summons was duly served and a verified complaint filed. The defendant was represented by counsel but filed no answer. The plaintiff's counsel stated he would agree to the allowance of time to file answer if defendant's counsel would say that he had a meritorious defence. This he declined to do, saying that he had a letter from his client stating he could not attend, but not informing him why he could not, not stating any ground of defence. Judgment final was thereupon entered. The conduct of defendant was inexcusable in not giving his counsel information on these points. Even now he shows no sufficient excuse for his failure to do this, and his Honor properly refused to set the judgment aside for excusable neglect. Besides, his refusal is a matter of discretion and not reviewable unless it appeared that his discretion had been abused. *Wyche* v. *Ross*, 119 N. C., 174; *Stith* v. *Jones*, Ibid 428; *Brown* v. *Hale*, 93 N. C., 188.

The defendant then insisted that the judgment should be set aside for irregularity. The part of the judgment alleged to be irregular is that rendered for the cause of action set out in the fifth section of the complaint which avers "that in addition to the sums of money due as aforesaid, and secured by mortgage, the said Calvin J. Cowles is indebted to the plaintiff in the sum of $158.30 to be added to the said sums secured by mortgage, by reason of the following facts," and here the facts are set out, which are in substance that the land had been sold for taxes against the mortgagor, and the plaintiff mortgagee, to protect the mortgaged property, by compromise paid the sum of $138.30 to the purchaser of the tax title, as otherwise (as he averred) his security would have been valueless and defeated. This was an allegation of a sum certain, paid for the benefit of the defendant, and the plaintiff evidently rested his claim of indebtedness upon the implied promise to repay. It is not the case of an officious payment, but a payment by a mortgagee to protect the title of the mortgagor. 15 Am. & Eng. Enc., 826, 827 and note. But whether the law raised an implied promise of repayment upon that state of facts it is indeed not necessary now to decide, for if it did not raise such implied promise his Honor, in rendering judgment that it did, committed an error of law which could only have been corrected by an appeal to this Court. It could not be corrected by the next Judge holding that Court, for he has no power to pass upon errors in law committed in the judgments rendered by his predecessor. *May* v. *Lumber Co.*, 119 N. C., 96.

If the sum demanded had been for unliquidated damages, or if, on contract, for an open account or other uncertain amount, the judgment should have been by default and inquiry. *Battle* v. *Baird*, 118 N. C., 854. But when, as here, the allegation is of a sum certain expended for the benefit of defendant and therefore upon an implied promise to repay, and the complaint is verified and no answer filed, the judgment is properly by default final. *Code*, Section 385(1). There was nothing for the jury to pass upon. Upon a judgment by default and inquiry the legal liability is fixed by the default, and the inquiry is only to ascertain the amount. Here, if the facts appearing in the sworn complaint, and not denied in any answer, were not sufficient in law to imply a promise to repay, there was an error of law in the Court so holding, *i. e.*, it was an erroneous judgment, but there was no irregularity. The allegation in the complaint was of a sum as definite and fixed as if it had been evidenced by a bond or note. If upon the law the plaintiff was entitled to recover at all, upon the facts stated in the verified complaint there could be no question as to the amount, and no inquiry was required to ascertain it.

Affirmed.

Montgomery, J., dissenting: The defendant, C. J. Cowles, borrowed a sum of money from the plaintiff, made his notes for the amounts and at the same time executed, with his wife Ida A. a mortgage to the plaintiff upon certain lands in the County of Alexander to secure the payment of the notes and interest. The defendant failed to pay the taxes for the year upon the lands conveyed in the mortgage and the same were sold by the Sheriff of Alleghany County for the taxes due thereon, at which sale W. B. Matheson became the purchaser and received a deed from the Sheriff for the lands. Matheson then brought suit against the defendants for the possession of the lands, but on the trial there were verdict and judgment against him. The plaintiff, however, being fearful of Matheson's recovery, eventually, and to protect his security made a compromise with Matheson by the payment to him of $158.25 without the knowledge or consent of the defendant, to surrender claim to the lands, all of which will appear in the receipt given by Matheson to the plaintiff in this action, which is in the words and figures following:

"Received of H. C. Cowles, mortgagee of C. J. Cowles $158.50, $100 compromise, and $20.20 purchase money, and 20 per cent. interest, $11.60 tax for 1893, and $25.85 costs of suit—W. B. Matheson v. C. J. Cowles and others—and 85 cents for registering the tax purchase deed, by way of compromise and full satisfaction of the suit of W. B. Matheson v. C. J. Cowles in Alexander Superior Court tried at Spring Term, 1894, thereof. And I agree to convey whatever interest I acquired by the purchase of the lands in controversy in said suit at the sale of ex-sheriff R. M. Sharpe on the 7th day of April without any convenants of warranty whatever to C. J. Cowles, February 17, 1891."

Matheson, upon the payment of the $158.50, abandoned his appeal. Afterwards the plaintiff brought this action to foreclose the mortgage. At the January Term, 1897, of Alexander Superior Court a judgment by default final was entered against the defendant C. J. Cowles for the amount of the debt secured by the mortgage, and also for the amount paid by the plaintiff to Matheson. At the July Term of the Court, the wife of the defendant having been made a party defendant a judgment of foreclosure was entered. The amount ascertained to be due under the decree of foreclosure was the amount of the debt secured in the mortgage and also $32.75 of the amount paid by the plaintiff to Matheson, that sum being the amount which Matheson had paid as taxes on the lands. The sum of $125.85 of the money paid by the plaintiff to Matheson was entered up and embraced in the judgment by default, but was made a personal judgment against the defendant. The defendant then made a motion to set aside the judgment by default rendered against him at the January Term, 1897, so far as that judgment included the sum of $125.85. The motion was overruled and the defendant appealed.

The motion was not heard in the Court below as having been made under *The Code,* Section 274, for that section is intended to afford relief in cases where a judgment has been taken against a defendant through his mistake, inadvertence or surprise or excusable neglect, and neither of these grounds was alleged in the motion. Indeed the motion itself sets forth no reason, nor assigns any ground, why the judgment complained of should be set aside, nor does it allege that the defendant has any defence against it. But his Honor considered it as having been made of common right (and not under Section 274 of *The Code*) in reference to the alleged irregularity of the judgment because of its having been rendered contrary to the provisions of Section 385 (1) of *The Code.* In *Skinner* v. *Terry,* 107 N. C., 103, there was no specific assignment of the ground of the irregularity of the judgment, but this Court in reviewing the judgment of the Court below held that to be failure immaterial, because the record itself showed the irregularity complained of. The Court said: "Such irregularity of the judgment was not assigned specifically as one of the grounds of the motion, but the real purpose of the latter was to have the judgment in question set aside for any proper cause. The motion was made in the action and it embraced the whole record within its scope so that the Court could see and ought to have seen the irregularity and granted the defendant such relief as the nature of his motion would allow, and as he appeared to be entitled to have." Of course, we do not understand that part of the opinion quoted above as applicable to a motion to set aside the judgment based on grounds *dehors* the record. In such a case the grounds would have to be set out so that the Court as well as the opposite party could see upon the motion itself such grounds as did not appear in the record, and upon which relief was sought.

In the case before us the record proper, the complaint and judgment, was before the Court on the motion, and the irregularity of the judgment, if there was any, could be seen upon inspection. The plaintiff made no exception to the failure of the defendant to specify in his motion the grounds upon which he was seeking the aid of the Court but on the other hand he contended that the judgment was neither erroneous nor irregular.

It must be borne in mind that the Court had found as facts, upon the hearing of the motion, that the compromise which was made by the plaintiff with Matheson was made without the knowledge or consent of the defendant, and that the amount of $125.85 of the compromise was embraced in the judgment by default against the defendant, but as a personal judgment and not as a lien on the lands.

The Court adjudged upon the facts found, taken in connection with the complaint, that the judgment by default to the amount of that $125.85 was rendered on the legal conclusion stated by his Honor that the facts set forth in the complaint raised an implied contract on the part of the defendant to reimburse the plaintiff the amount which the plaintiff had paid to Matheson in effecting the compromise. The concluding portion of the judgment is as follows: "That said compromise was effected without the knowledge or consent of Calvin J. Cowles and that said amount of $125.85 with interest at 6 per cent. from February 17, 1894, the date of payment to Matheson, was embraced in the judgment by default. The Court is of opinion that the judgment which the defendants attack must have been rendered on the ground that the facts set forth in the complaint raised an implied contract on the part of Calvin J. Cowles to reimburse H. C. Cowles the $125.85 paid by the latter in effecting the compromise. As to whether the construction so placed upon the facts set forth in the complaint was erroneous or correct, is not for this Court to determine. The defendant's remedy was by appeal or *certiorari.* The Court is of opinion that the judgment is not irregular and that the facts do not constitute excusable neglect. It is therefore adjudged, not as a matter of discretion, but for the reasons stated, that the motion be denied and that plaintiff recover of defendant Calvin J. Cowles his costs in the motion."

The ruling of his Honor brings up for decision the question whether the facts set forth in the complaint, taken as true, amounted to an implied contract on the part of the defendant to pay to the plaintiff a sum of money fixed by the terms of the contract. If so, the judgment was regular and the plaintiff is entitled to no relief upon his motion, for he shows no merits, nor any defence upon the *face* of the motion. If the judgment to the extent of the $125.85 is conceded to be irregular, even then the defendant is entitled to no relief, no defence or merits appearing on the face of the motion, unless the record itself discloses a legal defence. First, then, is the judgment irregular? We think it is.

The plaintiff took his judgment by default final under Section 385 (1) of *The Code*, and for a breach of an implied contract on the part of the defendant to pay to him the $125.85 which the plaintiff had paid to Matheson in compromise and settlement of Matheson's claim against the lands. The plaintiff does not claim the right to recover as for money paid to Matheson at the request of the defendant and for him; for it is admitted that the money was paid without the knowledge or consent of the defendant. Nor does it any where appear that there was any legal obligation upon the plaintiff to pay the money to Matheson on account of any liability which he had incurred because of defendant's default. The plaintiff was negligent in that he failed to look after his security by seeing that the taxes were regularly paid by the mortgagor or to pay them himself if the mortgagor failed to do so, thereby making them a lien on the land under the Revenue Law. And it was to protect himself and not for the benefit, directly, of the defendant that the plaintiff paid the money to Matheson. If Matheson had made a deed conveying the lands to the defendant after the compromise had been made and the defendant had received the deed with a knowledge of the facts under which it was executed, the case might have been different; but it does not appear that that was done. Matheson simply withdrew his appeal. The judgment therefore is irregular in that it was a final judgment, there having been no implied contract to pay on the part of the defendant.

Is the defendant then entitled to relief by reason of matters appearing on the complaint? We think so; for the plaintiff has no cause of action against the defendant as stated in the complaint for the amount of the $125.85. The plaintiff's cause of action as stated in his complaint did not warrant any kind of judgment as far as the $125.85 is concerned.

I think there was error in the refusal of the Court to set aside the judgment by default obtained at January Term, 1897, to the extent of the $125.85, and that the judgment should be modified to that extent.

Furches, J., having been of counsel did not sit on the hearing of this case.

CRITZ v. SPARGER.

Practice—Certiorari—Verification of Petition—Transcript of Record—Failure to File Transcript—Laches—Docketing Appeal.

1. When the petition for a *certiorari* is not verified as required by Rule 42, and no transcript of the record proper is filed, and no sufficient reason is given for the failure to docket the record and case on appeal, the motion will be denied.
2. The failure of the Clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from *laches*.
3. Where a case was tried below after the commencement of the Term of this Court to which the appeal was taken, appellant is not prejudiced by a refusal of his motion for a *certiorari* returnable at such Term, but may docket his appeal at the next Term.

MOTION of appellant for writ of *certiorari*.

Messrs. Jones & Patterson, for defendant (appellant).
No counsel, *contra*.

CLARK, J.: The petition is not verified as demanded by Rule 42 and there is no transcript of the record proper, nor reason given for its absence and nothing to negative *laches* in not having that, and the case on appeal also, docketed. *Burrell* v. *Hughes*, 120 N. C., 277 and cases cited; *Brown* v. *House*, 119 N. C., 622; *Parker* v. *Railroad* and *Rothchild* v. *McNichol*, the last two at this term. It is true it is alleged that the case on appeal was filed in the Clerk's office and that the Clerk has failed to send up the transcript, but there is no allegation that the appellant has tendered the fees and is otherwise free from *laches*. *Brown* v. *House*, *supra* and cases cited.

It may be that this case was tried below since the present term of this Court began; if so, the appellant was not required to docket his appeal at this term (Rule 5) though it would stand for trial at this term if it reached here in time (*Avery* v. *Pritchard*, 106 N. C., 344) and the appellant is in no wise prejudiced by the refusal of his motion for the writ of *certiorari*, but may docket his appeal if such is the case, at the next term of this Court.

Motion denied.

R. ROTHCHILD v. A. McNICHOL.

Practice—Appeal—Certiorari—Verification of Petition—Transcript of Record—Docketing Appeal.

1. When the petition for a *certiorari* as a substitute for an appeal has not been verified as required by Rule 42, and no transcript of the record has been filed and no excuse shown for the failure to file it, the motion will be denied.
2. Though, in such case, the motion for a *certiorari* is denied, the appellant may docket the appeal at the Term of this Court to which it was taken before a motion is lodged for its dismissal or, if the case was tried below since the commencement of the Term to which the appeal was taken, the appellant may docket the appeal regularly at the next Term.

MOTION of appellant for writ of *certiorari*.

Messrs. Watson, Buxton & Watson, for defendant (appellant). No counsel *contra*.

Per Curiam: The motion for the writ of *certiorari* must be denied. The petition is not verified as required by Rule 42, nor is the transcript of the record proper filed, nor good reason given for the failure to do so. *Burrell* v. *Hughes*, 120 N. C., 277, and cases cited; *Brown* v. *House*, 119 N. C., 622; *Parker* v. *Railroad*, at this term. Indeed no excuse is shown why the transcript of the whole record, including the case on appeal, is not filed. The motion for *certiorari* must be denied, yet, as no motion to dismiss has been made, it can still be docketed at any time this Term, if before such motion is made. *Smith* v. *Montague*, at this term; *Triplett* v. *Foster*, 113 N. C., 389. Indeed, if the cause was tried below since this Term began, it can be docketed regularly at next Term.

Motion denied.

H. F. JONES v. J. C. BUXTON et al., Trustees.

Practice—Restraining Order—Injunction—Irreparable Injury.

Where, in an action brought in good faith to quiet plaintiff's title to land and to determine the adverse claims of the defendants, an interlocutory order was issued restraining the defendants from selling the land under a deed of trust, and material issues were raised by the pleadings used as affidavits, and no facts were found by the Judge on the hearing of the rule to show cause, &c., it was error not to continue the injunction to the trial of the action.

CIVIL ACTION, begun by summons in FORSYTH Superior Court, and upon the complaint the plaintiff obtained a restraining order which was heard before *Starbuck, J.*, at Chambers, September 30th, 1897. Upon the complaint, answer, replication and affidavits, his Honor dissolved the restraining order and plaintiff appealed.

Messrs. Jones & Patterson and *A. E. Holton*, for plaintiff (appellant).

Messrs. Watson, Buxton & Watson, for defendants.

DOUGLAS, J.: This is an appeal from the order of the Court below dissolving the restraining order. The order is as follows: "It is ordered by the Court, without finding facts, but as a matter of law, that the restraining order be dissolved at the cost of the plaintiff, to be taxed by the Clerk." The action was brought by the holder of a tax deed, who had also bought at a sale under a deed of trust in which he was the *cestui que trust.* He appears to be in possession, and brings this action to "quiet his title to the land, and determine the adverse claims of the defendants." "Wherefore he asks that defendant be restrained from selling under the deed of trust and for such other relief as the plaintiff is entitled to in the premises." It is thus seen that a perpetual injunction is the principal relief sought, and in fact the only relief specifically asked.

A sale of real property nearly always threatens irreparable damage, and especially a forced sale for cash at public auction. Material issues are raised in the pleading, and as no facts have been found either by the Court or a jury, we are of opinion that the injunction should be continued to the final hearing. *Capehart* v. *Biggs,* 77 N. C., 261; *Purnell* v. *Vaughan,* Ibid., 268; *Lowe* v. *Commissioners,* 70 N. C., 532; *Bridgers* v. *Morris,* 90 N. C., 32; *Heilig* v. *Stokes,* 63 N. C., 612; *Jarman* v. *Saunders,* 64 N. C., 367; *Hanes* v. *Mauney,* 67 N. C., 218; *Dockery* v. *French,* 69 N. C., 308; *Harrison* v. *Bray,* 92 N. C., 488; *Durham* v. *Railroad,* 104 N. C., 261; Clark's Code, Section 333, page 393, *et seq.* The action appears to have been brought in good faith to determine substantial matters of difference, and yet "in despite of the action now pending, the defendants seek to cut the 'gordian knot' by a sale of the land under the power in the mortgage deed. This cannot be allowed." The injunction should be continued to the hearing, and the judgment of the Court below is reversed.

Reversed.

L. D. LOWE et al. v. R. HARRIS et al.

Practice—Trial—Service of Process—Town Constable—Appointment of Guardian ad Litem—Power of Clerk.

1. Although a contract for the purchase of land, relied upon by the defendant in his answer in an action to recover land, appears by the pleadings (in which the plaintiff set up the Statute of Frauds) to be void, nevertheless it was error, upon the call of the case for trial in the Court below to render judgment upon the pleadings, the defendant, in such case, being entitled to have the case proceed to trial and to have the plaintiff to make out and recover upon the strength of his own title and not upon the weakness of the defendant's.
2. Where a town charter provides for the appointment of a Chief of Police or marshal and authorizes him to execute all process directed to him by the Mayor or others and declares that, in the execution of such process, he shall have the same power, etc., which Sheriffs and Constables have, the service by such officer of a summons directed to "the Sheriff of W. County or town Constable of W. town" is valid. (*Davis* v. *Sanderlin,* 119 N. C., 84, distinguished).
3. Under Chapter 389, Acts of 1887, the Clerk of the Superior Court has power to issue summons against infant defendants ordered to be made parties to an action pending and for trial at Term and to appoint a guardian *ad litem* for them.

CIVIL ACTION heard before *Greene, J.*, at Spring Term, 1897, of WILKES Superior Court. His Honor rendered judgment for the plaintiff upon the pleadings and defendants appealed.

Mr. W. W. Barber, for defendants (appellants).

No counsel, *contra.*

MONTGOMERY, J.: In the opinion delivered in this case at February Term, 1893, and reported in 112 N. C., 472, a new trial was granted on the sole ground that the defendant had been allowed on the trial to introduce parol evidence to locate and identify the tract of land, the subject of the action, the description in the written contract to convey being so indefinite as to amount, in law, to no description whatever. On the call of the case in the Court below at Spring Term, 1897, his Honor, seeing from the opinion handed down from this Court that the contract upon which the defendant relied had been declared by this Court to be void on its face because of uncertainty of description of the land mentioned in the contract, gave judgment for the defendant upon complaint and answer and replication, the latter pleading setting up the statute of frauds. His Honor committed error in the course he adopted. The case should have proceeded to trial; for, notwithstanding the judgment of this Court, the plaintiff (the action being for the possession of the land then occupied by the defendant) had to make out his own title and recover upon the strength of that, and not upon the weakness of the defendants'. It is true that the contract under which the defendants claimed was void, but this should have been declared by the Court below when it should have been offered in evidence. We deem it proper to take up and settle the other exceptions.

It appears that a special appearance was made by the defendants, except Roxie Barber, for the purpose of having the action dismissed on the ground that in making the heirs at law of the original defendant, who had died after the commencement of the suit, parties under the provisions of Chapter 389 of the Laws of 1887, the Clerk had exceeded his authority in appointing guardians *ad litem* for the newly made parties, infants; and on the further ground that service of the summons had not been properly made upon the defendants. The objection to the service of the summons was that it had been directed "to the Sheriff of Wilkes County or Town Constable of Wilkesboro, N. C.," and the return signed "E. M. Pardew, Constable of Wilkesboro," when in point of fact there was no such officer as "Constable" of Wilkesboro.

We think that the Court was correct in holding that the summons was duly served. It is true that the Act of incorporation of Wilkesboro (Private Laws 1889, Ch. 24) does not designate any of the officers provided for by the specific name "Constable" but it does provide for the appointment of a chief of police or marshal, and the person who executed the summons in this case was the regularly appointed chief of police or marshal of the town of Wilkesboro. That officer is authorized by Sections 23 and 24 of the Act of incorporation of the town to execute all process directed to him by the Mayor or others, and in the execution thereof shall have the same power which Sheriffs and Constables have, and charge the same fees for the service.

The rights and duties of a town Constable in reference to the service of process being the same with such rights and duties of the marshal of Wilkesboro, we are of the opinion that, in respect to the service of process, the difference between the two officers is only a difference of name, the names being different designations of the same office. There is nothing in conflict between this ruling and the one made in *Davis* v. *Sanderlin*, 119 N. C., 84. The point there was that the town constable undertook to serve the summons, which was addressed to a constable or other lawful officer of the county, outside of the limits of his town. This Court held that only a constable appointed or elected for the County at large could serve that summons, and that a town constable could not serve process outside of his town unless the process was addressed to the town constable, not individually, but officially of course.

The remaining exception is to the ruling of his Honor sustaining the action of the Clerk in issuing the summons against the infant defendants and the appointment for them of guardians *ad litem.* We think there was no error in this ruling. The Clerk exercised the authority given him under the Act of 1887, Ch. 389. We think the Act gave the Clerk the power he exercised. For the error pointed out in the conduct of the trial there must be a new trial.

New trial.

A. E. ALSPAUGH v. BRITISH-AMERICAN INSURANCE COMPANY OF TORONTO, CANADA.

Fire Insurance—Conditions in Policy—Violation of Conditions—Waiver of Breach of Conditions.

1. Where a policy of insurance on a factory contained a condition that it should not be operated later than 10 o'clock at night and that a violation of such condition should create a forfeiture of the policy, and the premium required for a mill running day and night was much greater than for one running in day time only; *Held*, that such condition was a substantial provision of the contract and not a mere technicality and its violation vitiated the policy.
2. An agent of an Insurance Company, at the request of a mortgagee, issued a policy on the mortgaged property for the benefit of the mortgagor but without a formal written application, and kept both policy and the premium paid in his hands for some time, and, after the property was burned, procured a written application from the mortgagor and sent it, with the premium, to the home office and then delivered the policy to the mortgagee. The Company's adjuster, while inspecting the premises, learned of the violation of a condition of the policy and afterwards delivered to the mortgagee's attorney, at his request and as a personal favor, general blanks upon which proofs of loss were made out but there was no evidence that the adjuster was such an agent that notice to him would affect the Company. *Held*, that such facts did not constitute a waiver by the Company of its right to claim a forfeiture of the policy by reason of a breach of the condition.

CIVIL ACTION tried before *Starbuck, J.*, and a jury at July Term, 1897, of ALEXANDER Superior Court. At the close of the plaintiff's evidence the defendant moved for judgment, under Ch. 109, Acts of 1897, which was granted and plaintiff appealed.

Mr. L. C. Caldwell, for plaintiff (appellant).
Mr. E. C. Smith, for defendant.

FURCHES, J.: The plaintiff offered in evidence a policy of insurance for $1,500 issued by the defendant company to J. F. Moore, mortgagor, for the benefit of the plaintiff, Alspaugh, the mortgagee of the property destroyed; also an application for the insurance signed by J. F. Moore, the mortgagor. But it was shown that this application was prepared by Cowles, the agent of the defendant, forwarded to Moore, signed and returned to the agent after the policy had been issued and after the property named in the policy had been destroyed by fire.

The plaintiff, Alspaugh, resides in the State of Oregon, and the policy was in fact issued upon his application to the defendant's agent. This application was made by letter, enclosing a check for $45 and requesting the agent of the defendant to issue a policy for $1,500 on the property, which had before been insured at the same rate of premium, for the same amount, and upon the same conditions as those contained in this policy. The policy contained a provision that the mill should not be run later than ten o'clock at night, and that a violation of this stipulation should create a forfeiture of the policy. It was in evidence and not denied that the mill had been running on full time, day and night, for two weeks or more; and run all night on the night before the fire; that the rule, when the mill ran all night, was to stop at six in the morning for fifteen minutes when the night force went off and the day force was put on duty; that this change had taken place, and the fire was discovered a few moments after this change, from the night to the day force, had taken place; that the premium on a policy, to run day and night, would have been five and one half per cent, while the premium paid on the policy sued on was three per cent.

The plaintiff also showed by the evidence of Cowles, the agent of defendant, that upon the receipt of the plaintiff's letter enclosing check for $45 and requesting him to issue a policy for $1,500 he at once wrote up the policy; that he left home that day for a trip to Atlanta, Georgia, and did not return home for about two weeks, and not until after the fire and destruction of the property; that, after his return, he forwarded the premium to the home office, notified them of the loss and retained the policy in his office until it was called for by the attorney of the plaintiff, when he delivered the policy to said attorney.

The plaintiff further showed that not long after the fire, one Catlin, an adjuster of defendant, went to the place of the fire, examined the same, and took some measurements; and that Moore, the mortgagor, at that time told him that the mill had been running at night; that after this, said Catlin, at the request of the plaintiff's attorney and as a personal favor to him, furnished him blanks upon which he made out the proofs of loss; that Cowles, witness for plaintiff, testified that he held the policy from the time he made it out until he delivered it to Caldwell as the agent of defendant. The plaintiff here rested his case.

The defendant offered no evidence, and contended that the plaintiff had not made out a case entitling him to recover, and the Court being of opinion with the defendant, the plaintiff submitted to a judgment of non-suit and appealed.

There were several questions discussed on the argument. The irregularity of issuing without a formal application; whether the policy should not have been issued to the plaintiff, and not to Moore for his benefit; and as to what effect the application made by Moore, after the fire, had upon the matter. It was also contended by the plaintiff that the plaintiff had never seen the policy, nor had he been informed as to its conditions, and was not bound by them. It was also contended that the violation of the stipulations was by Moore, the mortgagor, and that plaintiff was not affected by what he did. But, conceding there had been a breach of conditions sufficient to vitiate the policy, it was contended by plaintiff that this objection had been waived by defendant. The plaintiff claimed that the fact that defendant's agent procured Moore to make a formal application for the policy after the fire, the fact that the agent held the policy at the time of the fire, and had it in his possession at the time he forwarded the premium and notified the company of the destruction of the property by the fire; the acceptance by the company of the premium; the fact that Catlin furnished blanks to make out proofs of loss after Moore had informed him that the mill ran at night, amounted to a waiver and that defendant is liable.

Waiving all irregularities mentioned as to the issuance of the policy, we must still hold that running the mill day and night was a violation of the terms of the contract that vitiates the policy, and the defendant is not liable unless it has waived this defence.

This condition is not an irregularity. It is not a mere technicality. It is substantial—the risk being greater to run night and day, and the premium required is nearly twice as much.

It remains to see if the defendant has waived this defence, and it seems to us that it has not.

The fact that the agent, Cowles, got Moore, the mortgagor, to make a formal application for the policy, has nothing to do with it. The policy had been issued and the premium paid, weeks before this application was made, and no policy was ever issued on that application. *Nelson* v. *Ins. Co.*, 120 N. C., 302. It is a mistake of fact that the premium was paid to and accepted by the company after it had information that the mill was being run at night. It may be, though it does not distinctly appear, that the agent, Cowles, forwarded the premium to the home company after Moore told Catlin that the mill was run at night. But the money was paid by the plaintiff and received by the company when the agent, Cowles, received it and issued the policy. Besides, there is no evidence showing that Catlin, who it seems was sent there as an adjuster, was such an agent that knowledge to him would affect the company. And without seeing how the defendant was affected by what Moore said to Catlin, it must be supposed that the defendant believed that plaintiff had not violated the terms of the contract, when it got the money from Cowles. But whether it did or not, it had already received the money when it was paid to Cowles. This $45 paid to Cowles on the 14th of November was not his money, and the fact that he forwarded it to the home office can make no difference, so far as defendant's liability is concerned.

It is probable that it would have been different if the premium had not been paid to Cowles until after the fire, and had been received by him with full knowledge of the fact that the mill was running both day and night. 2 Beach Law of Ins. Section 757 and 758.

The fact that the plaintiff had not seen the policy can make no difference. He knew that $45 would only pay for a day policy on $1,500 insurance. Besides, Cowles testified that he held the policy as the agent of the plaintiff from the time he filled it out until he delivered it to plaintiff's attorney. This is the most favorable construction of the transaction for the plaintiff, for, if it be said the policy was not issued until it was delivered to plaintiff's attorney, it then follows as a fact that plaintiff had no policy at the time of the fire. But plaintiff cannot claim the benefits of the policy and repudiate that that is against him, in the absence of any allegations of fraud or deception. A palpable violation of the terms of the policy being shown, by which the same is vitiated, and plaintiff having failed to show that defendant has waived its right to this defence, the judgment must be affirmed.

Affirmed.

BOARD OF COMMISSIONERS OF McDOWELL COUNTY v. BOARD OF COMMISSIONERS OF FORSYTH COUNTY.

Paupers—Settlement—Liability of County for Support.

1. The liability of a County for the support of a pauper is determined by his "legal settlement" which is acquired by one year's continuous residence in the county and continues until a new one is acquired.
2. Where a pauper, temporarily absent from the County where he has a "legal settlement," is so disabled as to require immediate medical services and is furnished by the authorities of another County with such attention and board, the latter is entitled to recover the expenses thereof from the County where the pauper has his settlement.

CIVIL ACTION, tried before *Greene, J.*, at February, 1897, Term, of FORSYTH Superior Court. His Honor, by consent, found the facts (which are substantially stated in the opinion) and from the judgment rendered thereon for the defendant the plaintiff appealed.

Messrs. Jones & Patterson, for plaintiff (appellant).
Messrs. Glenn & Manly, for defendant.

FAIRCLOTH, C. J.: By consent of the parties the facts were found by his Honor, and are as follows:

One Beck was born and reared and had always lived in the defendant County, except for short periods, when he went off to work temporarily, and had made a crop in that County the Summer before he was hurt, and had never been a County charge. In the Fall of the same year he worked a while in Buncombe County and then went to the plaintiff County, where he was hurt by a train so badly that it would have been dangerous to remove him to the poor house. Neither he nor his mother nor sister had any property.

The chairman of the plaintiff Board of Commissioners procured a physician and board and nursing at a private house for Beck, until he was able to be removed, when the plaintiff Board ordered him to be carried to Forsyth county, which was done. The accounts of the doctor and landlord and the railroad ticket were audited by the plaintiff, and their Treasurer, under their order, paid the same.

Upon these facts his Honor held that the defendant County was not liable, and rendered judgment against the plaintiff for costs of the action. The law regulating this matter is purely statutory. *Code*, Sections 3544 and 3545. The legal settlement of the pauper determines the liability in such cases, which settlement is acquired by one year's continuous residence, and continues until lost by acquiring a new one. The question was considered and decided by this Court in *Commissioners of Burke County* v. *Commissioners of Buncombe County*, 101 N. C., 520.

Upon the principle of *that* case, the plaintiff in *this* case is entitled to recover on the record before us.

Reversed.

NANCY E. SIMS, by her Guardian W. R. Sprinkle v. W. M. SIMS.

Action for Divorce—Lunatic—Void Marriage—Guardian of Lunatic—Removal—Right of Guardian of Lunatic to Maintain Action for Divorce—Confirmation of Report in Inquisition of Lunacy.

1. A marriage with a declared lunatic is absolutely void *ab initio.*
2. A marriage void on account of lunacy cannot be cured by cohabitation after restoration; being a nullity, such marriage could only be remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground or by a new marriage.
3. An action for divorce may be maintained by a guardian of a lunatic in the name of his ward.
4. The appointment of a guardian for a lunatic is valid until the proceedings and orders under the inquisition are reversed.
5. *Ex parte* proceedings to have a lunatic declared sane, brought without service of notice upon the guardian of such lunatic, are a nullity as well as an order made in such proceedings removing the guardian without notice. (Section 217(3) of *The Code.*)
6. The report of a jury in an inquisition of lunacy need not be formally "confirmed" by the Clerk of the Superior Court, the statute only requiring it to be "filed and recorded."

ACTION for divorce brought by Nancy E. Sims, by her guardian, W. R. Sprinkle, against W. M. Sims, tried before *Starbuck, J.*, and a jury at Fall Term, 1897, of WILKES Superior Court.

The action is entitled "Nancy E. Sims, by her guardian, W. R. Sprinkle v. W. M. Sims." On the trial the following issues were submitted:

1. Is the action brought in the name of the proper party, *to-wit:* W. R. Sprinkle, Guardian?

2. Did Nancy E. Sims have sufficient mental capacity to enter into a marriage contract with W. M. Sims on the 14th day of November, 1893?

On October 2, 1893, a proceeding was begun to enquire into the mental condition of Nancy E. Sims, who at that time was Nancy E. Sprinkle. Accordingly, a jury was summoned, who found and reported her to be incompetent, for want of understanding, to manage her business affairs and subsequently the application of W. R. Sprinkle to be appointed her guardian was granted and he was accordingly appointed by the Clerk of the Superior Court in March, 1895. Thereafter, in August, 1895, under an order of the Clerk of the Superior Court, in a proceeding for that purpose, a jury found that Nancy Sims was sane and competent to transact the ordinary business affairs of life, and upon the coming in of the report it was adjudged "that the report of the said jury be and the same is hereby in all things confirmed and approved by the Court; and the Court doth declare her, the said Nancy E. Sims, to be of sane mind and competent to attend to the ordinary business affairs of life, and doth further order that William Sprinkle be removed from his said office as guardian of her personal property and turn over the same to her or her duly authorized agent, and that he at once report to this Court the condition of the estate and the manner in which he has carried out this judgment; that notice issue to said former guardian informing him of his removal," etc. It is admitted that Sprinkle was not a party to and had no notice of said petition of W. M. Sims to remove him as guardian. It was admitted that Sprinkle had filed no report as guardian up to the time of this trial. After hearing the evidence his Honor decided that Sprinkle, as guardian, had the right to bring this action, and answered the first issue, "Yes." Defendant excepted. The plaintiff introduced evidence in support of his contention on the second issue, the defendant offered no evidence, and the jury answered said issue, "No." Defendant moved for a new trial for error in holding that the action was properly brought by Sprinkle as guardian. Motion overruled. Defendant excepted.

Judgment was thereupon rendered dissolving the marriage and defendant appealed.

Messrs. Glenn & Manly, for plaintiff.
Mr. W. W. Barber, for defendant (appellant).

CLARK, J.: On November 11, 1893, Nancy E. Sims, under appropriate proceedings begun sometime previous, was duly found by the jury to be mentally imbecile. The jury in the present case find that the alleged marriage with the defendant took place on the 14th of November, 1893. Such marriage is absolutely void *ab initio* and can be at any time so declared by the Courts. *Crump* v. *Morgan*, 38 N. C., 91, which has been often cited and approved (Womack's Digest No. 2005) and of late years in *Webber* v. *Webber*, 79 N. C., at p. 576 and *Baity* v. *Cranfill*, 91 N. C., at p. 298. The power of the Courts to declare marriages a nullity for incapacity of one of the parties, though not an adjudged lunatic at the time of the marriage, is also held in *Johnson* v. *Kincade*, 37 N. C., 470; *Setzer* v. *Setzer*, 97 N. C., 252; *Lea* v. *Lea*, 104 N. C., 603. This might be done even after the death of parties (*Gathings* v. *Williams*, 27 N. C., 487, though issue could not be bastardised) but it must be done in a direct proceeding, as in this case, and not incidentally. *Williamson* v. *Williams*, 56 N. C., 446. Such action is for a divorce (*Lea* v. *Lea*, *supra*) and all actions for a lunatic can be brought either in the name of the guardian or in the name of the lunatic by the guardian. *Crump* v. *Morgan*, *supra*; *Shaw*, Guardian v. *Burney*, 36 N. C., 148.

W. L. Sprinkle, son of Nancy E. Sims, was duly appointed her guardian after the aforesaid inquisition of lunacy, and such proceedings and orders are "valid until reversed or superseded." *Bethea* v. *M'Lennon*, 23 N. C., 523. The *ex parte* proceedings brought by the husband in 1895 to have the wife declared sane were without any notice or service upon the guardian to whom the law had confided the protection of her rights, and hence were a nullity, *Code*, Section 217 (3), as was also the subsequent order, founded thereon, removing him without notice. Indeed, the marriage at the time of a legally declared lunacy, being a nullity, could only have been remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage if the lunatic is since found to be restored. The void marriage on account of lunacy could not be cured merely by cohabitation after restoration. Marriages entered into by parties under the legal age however, being not void but voidable, can be validated by cohabitation after arrival at the marriageable age. *State* v. *Parker*, 106 N. C., 711; *Koonce* v. *Wallace*, 52 N. C., 194.

His Honor correctly adjudged that W. R. Sprinkle was authorized to bring this action. There is no other exception. As to the argument that the record does not affirmatively show that the report of the jury had been "received and confirmed" it is not required. *The Code*, Section 1670 only requires the Clerk to "file and record" it. But if it had been a case in which the Court was empowered to confirm the report, as the Clerk acted on it by appointing the guardian, the confirmation would have been presumed in the absence of evidence to the contrary, on the maxim *omnia presumuntur rite acta.* The jury found, further, that Nancy E. Sims did not have mental capacity to enter into the marriage with the defendant on the 14th of November, 1893, but this was unnecessary, as the marriage with a declared lunatic was *ipso facto* void. *Crump* v. *Morgan*, *supra.*

Affirmed.

MARGARET COLEY, Administratrix of J. P. Coley, v. CITY OF STATESVILLE.

Action for Damages — Issues — Municipality — Negligence — Arrest of Intoxicated Person without Warrant—Imprisonment—Injury to Person—Prison House, Construction and Condition of—Liability of Town—Proximate Cause—Instructions.

1. When the issues submitted on a trial are such as to enable the parties to present every phase of the controversy, no objection can be sustained either for those submitted or for refusing to submit other or different issues.
2. When the ordinances of a municipality authorize the arrest by its policemen, without warrant, of intoxicated persons on the street and suitable policemen have been appointed, the City incurs no liability for the arrest and confinement of such persons until fit for trial or sober enough to give bail
3. A municipality is required to exercise ordinary care in procuring necessaries for prisoners and supervising its subordinates and is liable only for failure to properly construct the prison or to furnish it so as to afford reasonable comfort and protection from suffering and injuries to health.
4. A municipality is not liable in damages for the negligence or mistake of its policemen who arrest, without warrant, persons engaged in violating its ordinances.
5. If a municipality has provided for prisoners arrested for violation of its ordinances a prison house reasonably comfortable and supplied to those in charge of it those things reasonably essential to prevent bodily suffering and disease, it is not liable for injuries resulting to a prisoner from the negligence of policemen or keeper of the prison in failing to make use of the means and appliances so furnished, unless the municipal authorities had, after notice of such negligence, failed to remedy or prevent the same.
6. On the trial of an action against a city for damages for the death of a person lawfully arrested and confined in a city prison, alleged to have resulted from defects in the construction or equipment of the prison, the jury were properly instructed that the burden was upon the plaintiff to show that the proximate cause of the death was the fault of the City in failing and neglecting to properly construct and provide a suitable prison, and that, if the condition of the prison did not cause or accelerate the death, then the plaintiff could not recover.

7. On the trial of an action against a city for damages for the death, in its prison, of a person, who had been lawfully arrested and imprisoned for intoxication until he should become sober enough to stand trial or get bail, it was not error to instruct the jury that, if they should find from the evidence that the deceased had heart or kidney disease or other malady and that such disease alone, or such disease and excessive drinking of intoxicants combined, proximately caused the death, then they should find that such death was not occasioned by the neglect of the City to provide a suitable prison for the health and comfort of prisoners.

8. In the trial of an action for damages for injuries resulting in the death of plaintiff's intestate through alleged negligence of defendant, the true measure of damages is the present value of the net income of the deceased, to be ascertained by deducting the cost of his living and expenditures from his gross income, based upon his life expectancy, and in such calculation it is proper for the jury to consider the health and habits of the deceased at the time of his death.

9. The mortuary tables contained in Section 1352 of *The Code*, being the provisions of a public Act, are competent without being specially put in evidence on a trial of an issue as to the *quantum* of damages for injuries resulting in the death of plaintiff's intestate.

10. The knowledge of a Chief of Police of a City concerning the defective construction or equipment of its prison is not such notice as will make the City liable for injuries resulting from such defects unless such knowledge has been communicated to the authorities or unless the authorities had failed and neglected to inspect the prison.

11. In the trial of an action for damages for an injury resulting from the alleged negligence of defendant, it was not error to instruct the jury as to the proximate cause of the injury that "the first requisite of a proximate cause is the doing or omitting to do an act which a man of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury."

12. In the trial of an action for damages for the death of a person confined in the prison-house of defendant corporation and resulting from the alleged negligence of defendant, an instruction that "before plaintiff can recover the jury must find that the death of the deceased was caused by the defective construction of said prison and its unwholesome condition" is not inconsistent with another instruction that defendant would be liable "if the jury should find that the structure or conditions of the prison caused or accelerated the death of deceased."

CIVIL ACTION for damages tried at August Term, 1897, of IREDELL Superior Court before *Coble, J.*, and a jury.

The plaintiff tendered the following issues:

"1. Was the death of the plaintiff's intestate caused or accelerated by the unwholesome condition of the prison of the City of Statesville, occasioned by the negligence of the said City to provide a prison suitable for the health and comfort of the prisoners?"

"2. What damage, if any, has the plaintiff sustained thereby?"

In lieu of these issues the Court submitted the following issues:

"1. Was the death of plaintiff's intestate due to the negligence of defendant as alleged in the complaint?"

"2. What damage, if any, has the plaintiff sustained thereby?"

Plaintiff excepted because the Court failed to submit her first issue in terms as above set forth, and the plaintiff excepted to the first issue submitted by the Court as above set out.

The defendant prayed for the instructions following, which were given with modifications and, as modified, are as follows:

"1. The defendant is not answerable in damages for arrests made by policemen for violations of the ordinances of the town and for the lawful commitment to prison made under such arrests; and if you find, therefore, that J. P. Coley, the intestate of the plaintiff, was upon the streets or in a public place in the town on the evening of the 12th of June in an intoxicated condition, or in such condition that to all appearances he seemed to be intoxicated, and the town police having their attention called to his condition, thereupon took the deceased into custody and carried him to the calaboose to detain him until sober enough to be taken before the Mayor and discharged according to law, and the said Coley was allowed to remain in the calaboose for this purpose, and while thus confined died in the calaboose, the defendant in this case is not liable in damages to the plaintiff, except and unless his death was caused by the condition and defective construction of the calaboose itself.

"2. When the defendant town, through its policemen, causes the arrest of persons engaged in violating its ordinances the town is discharging a governmental function, a duty and power conferred on it by its charter, and in this respect acts in the same way that the State acts through and by its Sheriff when he makes arrests for violation of the State laws; and in the discharge of these duties and obligations by the town, it does not incur any liability for damages for the negligence or mistake of its policemen.

"3. If the jury find that J. P. Coley was drunk, openly and publicly, in the town on the 12th of June, or to all appearances was publicly in a drunken condition, it was the duty of the policemen to arrest him, remove him from public view, and confine him in the city prison until sober, and then carry him before the Mayor to answer the charge, and it was not necessary for the policemen to have secured a warrant before he made the arrest and took said Coley into custody; and for making the arrest under such circumstances the defendant is not answerable in damages and the defendant would not be liable to the plaintiff in damages in this case on account of the arrest, even if the policemen had gone to the extent of using violence in making the arrest, or had been careless and negligent in making the arrest and putting the said Coley in prison.

"4. In order for the plaintiff to maintain her action in this case it is necessary for her to show to the jury by a greater weight of the evidence that the proximate cause of the death of her husband was the fault of the town in failing and neglecting to properly construct and provide for the town a suitable and necessary calaboose, station house or prison, and that owing to such failure on the part of the town, the confinement of her husband in the said town prison was the direct and proximate cause of his death; in other words, that the death of the said Coley would not have happened at the time it did, but for the fact that he was put in the town prison, which from its condition and defective construction by the town, its want of ventilation, produced the death of plaintiff's intestate. If you find the condition of the prison did not cause or accelerate the death of Mr. Coley, you will answer the first issue, No.

"5. But if you find that the defendant town had built a reasonably comfortable police prison for the purposes for which said prison is intended, and supplied and furnished to those who had immediate charge of it, those things that were reasonably essential to prevent bodily suffering on the part of prisoners while confined therein from excessive cold or heat, or hunger, and to reasonably protect their health; and you further find that plaintiff's husband was confined therein by the police of the town, for the reason that they honestly thought that he was drunk, the plaintiff's action in this case will not lie, and she cannot recover, and you will respond to the first issue, No.

"6. If the Aldermen of the town had provided a police prison as above described, that is, one whose structure and superintendence was such as to secure the health and comfort of the prisoners, and you find that J. P. Coley had been placed in the said prison by the policemen of the town, and that the police had failed, forgotten, or neglected to make use of the means and appliances furnished in the said prison for the reasonable comfort of the said Coley, while confined therein, as for instance, if they had failed to open all the doors and all the windows in such way as to give good ventilation; in such case the town would not be liable in damages to the plaintiff for this forgetfulness or carelessness of its policemen, unless this carelessness had been made known to the authorities of the town, and they had had notice to prevent the same, and if you find the facts as above stated, the response to the first issue will be, No.

"The doctrine is that while the town must provide a suitable police station in which to confine prisoners and exercise reasonable prudence in selecting suitable men to look after the prison and prisoners confined in it, neither the Board of Aldermen nor the town is responsible further than this, and the default, if there were any in the policemen of the town, would not make the town liable for the default of the said policemen.

"7. If the jury find from the evidence that the said Coley had some disease of the heart and indulged on the evening of the 12th too freely in the use of spirituous liquors, and thereby caused his own death, and that such disease and use of spirituous liquor was the proximate cause of his death, the plaintiff cannot recover, and the jury will respond to the first issue, No.

"8. If the jury believe from the evidence that J. P. Coley was diseased in his kidneys, and had some heart trouble, and that on the evening of the 12th he became intoxicated, and thereby brought on syncope or coma as testified to by the physicians, and that this excessive drinking was the proximate cause of his death, the jury will answer the first issue, No.

"9. If the jury find that the death of the said Coley was caused by some fatal malady or disease, and that he would have died in one place, as well as another, and that he did die from said disease as the proximate cause of death, the jury will answer all the issues in favor of the defendant;

and if the jury find that his death was caused by a disease and by his own acts, to-wit: excessive drinking, combined, and that such disease and excessive drinking was the proximate cause of his death, they will answer all the issues in favor of the defendant.

"10. If you find the facts to be, from the evidence, that the police of the defendant town arrested Mr. Coley in an apparent intoxicated condition on June 12th, and placed him in the police prison between 6 and 7 o'clock in the evening, and that the police prison in which he was placed was a room 7 feet wide, 9 feet long and 8 feet high, and that the door of the said prison room was a lattice door with 240 openings in it, and 32 inches wide and 78 inches high, and that the said lattice door communicated with a hallway which was 6 feet wide, 9 feet long and 8 feet high, and that at the East end of this hallway there was another lattice door 3 feet wide and 6 feet high communicating with the outside air, and that there was another door at the West end of the said hall which was left standing open, 32 inches wide and 6 feet high opening into the Mayor's office adjacent 20 feet by 24 feet in size, and should further find that there was a window at the North and South side of this Mayor's office left open at the time the prisoner was placed in the said cell, which communicate with the outside air, and that about the hour of 10 o'clock of that same evening said Coley was found dead in the said prison, and if these are all the facts, and the only facts, the jury find as to the construction and superintendence of the said prison, then these are not facts, if so found, which will fix the defendant with liability, and in this state of the case you are instructed to answer the first issue, No.

"12. On the question of damages, submitted in the second issue if you find the first issue yes, then you are instructed in that event only, that the measure of damages in this case is the present value of the net income of the deceased, which you would ascertain by deducting the cost of living and expenditures of the deceased from his gross income, and the jury cannot allow more than the *present value* of accumulation arising from such net income based upon the expectancy of life. In considering this question of what a man's life is worth, his habits, whether a sober or drinking man; his health, whether diseased and likely to die soon; or sound and in robust health, are matters which it is the duty of the jury to consider.

"13. You are instructed that there is no evidence offered by plaintiff in this case as to the life expectancy of plaintiff's intestate, except the age of the deceased and the condition of his health. But the jury have a right to consider the expectation of life as stated in the mortuary table in *The Code*, if the plaintiff has shown the age of her intestate at the time of his death. The plaintiff contends that her intestate's age was 41 years and the Court instructs the jury that the table in *The Code* states that the expectation of a man 41 years old is 27.5 years.

"14. The burden is upon the plaintiff in this case to sustain both of the issues by a preponderance of the proof, and if she fails to do so, or if the evidence is evenly balanced in your minds as to whether the defendant was guilty of any negligence or not, she cannot recover, and you will answer the issues for the defendant."

To the above special instructions given at the request of the defendant the plaintiff excepted.

The plaintiff asked the Court for special instructions Nos. 1, 2, 3 and 4, and the Court gave Nos. 1, 2 and 3 with modifications, which were embraced in the instructions Nos. 1, 2, and 3 following, but declined the 4th instruction, which is also set forth below:

"1. If the jury find that the cell in which the plaintiff's intestate was confined was defective in its construction, so that the prisoner's health or comfort for want of such ventilation as would secure to the prisoner pure atmosphere or protect him from noxious air and oppressive heat, and the plaintiff's intestate's death was accelerated thereby, the plaintiff is entitled to have the jury answer the first issue, yes, whether the authorities of the city had notice of its defective construction or not; they are bound in law to have that knowledge.

"2. That if the jury shall find that privies were located within 12, 16 and 18 feet of the cell where the intestate was confined, for the period of ten years, then the defendant had notice of their existence; and if the jury find further that the atmosphere in the cell was rendered unwholesome, so that the prisoner was forced to inhale the noxious substances in said atmosphere eminating from said privies, and that this accelerated his death, then the plaintiff is entitled to have the jury answer the first issue, Yes.

"3. The Constitution and Laws of North Carolina require that persons confined in any public prison shall have a clean place, comfortable bedding, as the season or other circumstances may require, wholesome food, drink and necessary attendance. If the jury find from the evidence in this case that there was no water closet, no buckets or other means provided into which excrement from the prisoners could have been placed, and the prisoner thereby protected from inhaling the noxious substances eminating therefrom, and further find that this state of things had existed for a considerable length of time, for many months, when it ought to have been discovered in the exercise of ordinary care, the town authorities would be presumed to have had notice; and if the jury further find that the intestate was laid on the floor as described by the defendants witnesses and permitted to remain there for the period of three hours or more without any attendance whatever, that this was not a performance of the duties required by law, and if the intestate's death was caused or accelerated thereby, then the plaintiff is entitled to have the jury answer the first issue, Yes.

"4. The intestate having been placed in said cell by one of the police of the defendant, assisted by its Chief of Police, the defendant thereby had notice of the condition of said cell, as notice to the Chief of Police was notice to the defendant, upon the principle that notice to the agent is notice to the principal. This 4th instruction the Court declined to give, and the plaintiff excepted."

The Court also gave the following general instructions to the jury, which, together with the special instructions above set out, were all the instructions given to the jury.

"The first issue submitted to the jury is: "Was the death of plaintiff's intestate caused by the negligence of the defendant as alleged in the complaint?" The plaintiff contends that it was. She contends that it was the duty of the authorities of the defendant City to see that the structure and superintendence of the City prison secured the health and comfort of the prisoners, and that in this case they did not do that. She contends that the prison in which her intestate was confined was a very small cell, 6 feet 9 inches wide by 9 feet long and 7 feet high; that there was no window or opening to the same, except the door which was closed by an iron lattice door with apertures about 2 inches square; that this door opened into a narrow passway leading from the rear door of the Mayor's office to a back door about 7 feet from the door of the cell, and that there was no opening into this passway except the door into the Mayor's office, and the back door of the house; that the cell was not properly cleansed, that it was filthy, and that on account of the improper structure and superintendence of the said prison and the filthy condition of the same, and the want of proper ventilation, the air therein was noxious and unwholesome, and *caused or accelerated* the death of the plaintiff's intestate, and that the defendant City was negligent, and that the jury should so find.

"The defendant on the other hand contends that the structure and superintendence of its prison was of such a nature as to secure the health and comfort of its prisoners; that it was properly cleansed; that there was an abundance of fresh air and ventilation; and it further contends that the death of the plaintiff's intestate was neither caused nor accelerated by any noxious air or unwholesome condition of the prison of the defendant City, but it contends that the intestate's death was solely due to the physical condition which he was in; that one of his kidneys was diseased, there was some trouble about his heart, and that he was suffering from urea in his blood, and that he was under the influence of alcoholic stimulants, that coma or depression resulted, and heart failure and death, and that the structure and the condition of the prison had nothing to do with it.

The jury are instructed that the burden is upon the plaintiff to prove by a greater weight of evidence that the death of her intestate was caused by the negligence of the defendant.

"Before the plaintiff can recover, the plaintiff must show that the proximate cause of her intestate's death was the negligence of the defendant. The first requisite of a proximate cause is the doing or omitting to do an act which a man of ordinary prudence could foresee might naturally, or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury.

"If the jury answer the first issue "No," they need not answer the second issue, this would put an end to the case.

If they answer the first issue "Yes," then they will proceed to answer the second issue as to the amount of damages.

"It was the duty of the defendant City to see that the structure and superintendence of its prison secured the health and comfort of the prisoners, that is, to see that the structure and superintendence of its prison was such as to secure the health and comfort of its prisoners.

"Cities or towns in the exercise of the judicial, discretionary, or legislative authority conferred by their charters, or in discharging a duty imposed solely for the benefit of the public incur no liability for the negligence of their officers unless some statute subjects the corporation to pecuniary responsibility for such negligence. They are not responsible for unlawful arrests by police officers. But if they provide a place of imprisonment which is so badly constructed that a prisoner cannot be reasonably comfortable therein, they are bound to have knowledge of such improper construction, and if injury results therefrom, they are responsible.

"By the word superintendence the law imposes upon governing officials or municipal corporations the duty of exercising ordinary care in procuring articles essential to the health and comfort of the prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates.

"If the jury in this case find from the evidence that the prison cell in which the plaintiff's intestate was confined when he died was 7 feet wide, 9 feet long, 8 feet high, that it had no opening into it through which air could pass, except an iron lattice door in which the apertures were 2½ inches square, opening into a passway 6 feet wide, 9 feet long and 8 feet high, leading from a door in the Mayor's office, in which there were two windows to a door opening on a back lot; and that about or near said lot, there were 2 or 3 privies, which had been there for 10 years, and that the said privies were 12, 16 and 18 feet from the said prison cell; and if the jury further find that on account of such construction of said prison, there was insufficient ventilation, and noxious and unwholesome air within said prison, and that such unwholesome or noxious condition of said prison caused or accelerated the death of the plaintiff's intestate, the jury will answer the first issue 'Yes;" and the jury in considering the structure of the prison have a right to take into consideration the location of said prison. If the structure and superintendence of the prison in question was such that the air therein was not unwholesome and noxious, and was such as to secure to the plaintiff's intestate confined therein a reasonable degree of comfort, and such as to protect him from such actual bodily suffering as would injure his health, then the defendant had performed its duty as to the structure and superintendence of the prison, and the jury will answer the first issue, "No."

"If the plaintiff has failed to show that the structure and superintendence of the said prison was such as not to secure the health and comfort of the plaintiff's intestate confined therein, the jury will answer the first issue, "No."

"If the death of the plaintiff's intestate was not caused or accelerated by the defendant's failure of duty as to the structure and superintendence of the said prison, but was caused by the said intestate's physical condition, then the jury will answer the first issue, "No."

"If the jury come to answer the second issue as to damages, the rule by which this estimate is to be made is 'the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.' As a basis on which to enable the jury to make their calculation or estimate, it is competent for them to consider, as shown from the evidence, the age of the deceased and his prospect of life, his habits and character, his industry and skill, the means he had to facilitate the making of money, the business he was employed in, and in this way to fix upon the net income which might be reasonably expected if death had not ensued, and thus get at the pecuniary worth of the intestate to his family.

"And the jury will ascertain the present value, based upon the expectancy of life, of the accumulation arising from the net income ascertained by deducting the cost of living and the expenditures from the gross income, and give this sum as their answer to the second issue.

"The plaintiff contends that her intestate was 41 years old when he died, and according to the mortuary table, the expectancy of a man 41 years old is 27.5 years. But the defendant contends that the condition of the plaintiff's intestate was such that he could not have lived; that under the most favorable circumstances he could not have lived long. The jury will determine from the evidence, if they come to answer the second issue, what in their judgment was the expectancy of life of the plaintiff's intestate.

"If the jury find that the plaintiff is not entitled to recover any damages, they will answer the second issue 'Nothing.'"

The jury answered the first issue in favor of the defendant.

The plaintiff moved for a new trial upon the following grounds:

"1. For that the Court erred in not submitting plaintiff's first issue tendered as above set forth, and in submitting in lieu thereof the first issue as above set forth.

"2. For that the Court erred in charging the jury as requested by the defendant as set out above.

"3. For that the Court erred in failing to give instruction number four asked for by the plaintiff.

"4. For that the Court erred in its charge as set forth above, in what it said concerning the proximate cause of intestate's death, and in its definition of what is a proximate cause.

"5. For that the Court erred in that after charging the jury as requested by the plaintiff, and in its general charge (all the instructions given the jury are set out above in the case on appeal) that if the jury should find that the structure or condition of the prison caused or accelerated the death of deceased, that defendant would be liable, and that they should answer the first issue submitted to them yes; then, as plaintiff alleges, proceeded further to charge the jury, as requested by the defendant in paragraph first, fourth, eighth, and ninth of its prayers for instructions, that before the plaintiff can recover in this action they must find that the death of the deceased was caused by the defective construction of said prison and its unwholesome condition, which charge, as plaintiff contends, was inconsistent with the charge already given, in that it failed to present to the jury the question whether the construction and condition of said prison accelerated the death of the deceased."

Motion for new trial was overruled and plaintiff excepted and appealed from the judgment rendered for defendant.

Messrs. Long & Long for defendant.
No counsel for appellant.

CLARK, J.: The issues submitted were such as enabled the parties to present every phase of the contention, and when such is the case no objection thereto can be sustained either for issues submitted or for refusing to submit other or different issues. *Rittenhouse* v. *Railway*, 120 N. C., 544; *Ricks* v. *Stancill*, 119 N. C., 99; *Bradsher* v. *Hightower*, 118 N. C., 399.

Thirteen special instructions duly numbered (out of 16 asked) were given at the request of the appellee. The appellant excepted "to the above special instructions given at the request of the defendant." We cannot agree with the appellee that this exception is invalid as a "broadside" exception. The identical point is passed upon in *Witsell* v. *Railroad*, 120 N. C., 557. The requests to charge being "separately stated and numbered," (*Code*, Section 550) an exception for giving them is equally specific and not "broadside" since it gives the Judge and the appellee specific information of each instruction excepted to, what evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss on appeal. As that opinion states "this is specific information which would not be fuller if a separate exception was made *seriatim* to each instruction given.

But upon scrutinizing the thirteen instructions excepted to, we find no error therein. As to the first instruction, the charter and ordinances authorized the police to arrest the plaintiff's intestate and to hold him till fit for trial or sober enough to give bail. If the city appointed suitable police it incurred no liability for their action in making the arrest under the circumstances in this case. *Moffitt* v. *Asheville*, 103 N. C., 277, which follows, and cites *Hill* v. *Charlotte*, 72 N. C., 55; *State* v. *Hall*, 97 N. C., 474; 2 Dillon Mun. Corp., Sections 965 and 975. The defendant is liable only for failure to properly construct the prison or to so furnish it as to afford reasonable comfort and protection from suffering and injuries to health. *Moffit's case, supra;* Shearman & Red. Neg., Section 139 and note 2. The town is required to exercise ordinary care in procuring necessaries for prisoners and supervising its subordinates. *Threadgill* v. *Commissioners*, 99 N. C., 352. The same authorities sustain the second, third, fifth and sixth prayers for instruction given for defendant, as do also *Shields* v. *Durham*, 116 N. C., 394, 407; S. C., 118 N. C., 450. The 4th, 7th, 8th, 9th, 10th and 14th prayers of defendant were also properly given. The 12th instruction lays down the rule of damages in accordance with that in *Pickett* v. *Railroad*, 117 N. C., 616; and the 13th was based upon the mortuary tables, (*Code*, Section 1352) which being a public act was competent without being put in evidence.

The appellant further excepts to the refusal to give the appellant's fourth prayer. So far as it was correct, it was given in the appellant's first prayer and in the general charge also, and in so far as it asks the Court to instruct that notice to the chief of police was notice to the city, it was counter to *Shields* v. *Durham*, *supra*, in which case it was held that the town was fixed with notice, not because of the knowledge of the chief of police, but because he had told some of the governing body, and because of the long time the prison had remained in a bad condition and the failure of the commissioners to have the same inspected by a committee of their body.

The Court's definition of proximate cause is supported by ample authority. *Milwaukee* v. *Kellogg*, 94 U. S., 469, 475; S. & Red. Neg., Section 739; *Campbell* v. *Stillwater*, 50 Am. Rep., and cases cited. The plaintiff's fifth and last exception cannot be sustained. There was no inconsistency. We concur with the counsel for appellee that his Honor's charge was "fair, full and impartial, presenting every just contention of the appellant."

No error.

S. W. RAINEY v. R. E. HINES, et al.

Action to Recover Land—Contract Relating to Land—Exchange of Land—Partial Performance of Contract—Remedies—Judgment, as Evidence.

1. Where parties made a contract for exchange of lands and one paid "boot money" and received deeds from the other and, in order to perfect title to the lands so conveyed to him, was compelled to pay off encumbrances which the other party should have discharged; *Held*, that such party is equitably entitled to have a lien for the amount so expended by him declared upon the lands which he agreed to convey but has not yet conveyed to the other, and to have such lands sold for the reimbursement of the sums so expended.

2 In cases where it is only sought to prove the existence or contents of a judgment it is only necessary to produce in evidence a duly authenticated copy of the judgment itself, a full copy of the proceedings in which the judgment was rendered being required only where the judgment is relied upon to establish any particular state of facts upon which it was based, or as matter of estoppel.

CIVIL ACTION tried before *Starbuck, J.*, at August, 1897, Term of FORSYTH Superior Court. The facts appear in the opinion. From a judgment for the plaintiff defendants appealed.

Messrs. Watson, Buxton & Watson, for plaintiff.
Messrs. Jones & Patterson, for defendants (appellants).

MONTGOMERY, J.: On the 5th of December, 1890, the plaintiff, being the owner in fee of a tract of land in Forsyth County, N. C., known as the Germanton tract, agreed in writing to exchange the same with L. L. Thomas for a piece of Thomas's land consisting of two contiguous tracts in Henry County, Virginia. By the terms of agreement of exchange the plaintiff was to pay to Thomas $2,000 in addition, partly in cash and partly in future instalments. Each party was to make good and sufficient title to the other to the lands exchanged and each to remove all encumbrances from his own property. The plaintiff went into possession of the land in Virginia in January, 1891, and Thomas went into possession of the Germanton tract during the same month and year. The plaintiff paid to Thomas the balance of the "boot money" in January, 1893, and at the same time received a deed from Thomas to one of the tracts which was encumbered in Virginia, Thomas informing him then that he could not make a deed to the other contiguous tract for the reason that one Donovant had a vendor's lien on it for about $1,000. The plaintiff has never made a deed to the Germanton tract to Thomas. The defendant Hines is the purchaser of the Germanton tract through *mesne* conveyances from Thomas. After the payment of the difference in exchange by the plaintiff, the plaintiff also paid the lien of Donovant, the vendor of Thomas, $787.89, and also the sum of $188.60 the amount of a judgment of the Circuit Court of Henry County, Virginia, (which amounted to $198.13 at the time of the trial of this cause) in favor of the Roanoke & Southern Railway Company against the plaintiff and Rainey and others, and which judgment was declared to be a lien upon one of the tracts of the Virginia land.

The present action was brought by the plaintiff to impress on the Germanton tract an equitable charge in favor of the plaintiff for the amount he paid to Donovant and also for the amount which he was compelled to pay upon the judgment in favor of the railroad company against Thomas and himself.

In the argument here the matter was treated by the defendant's counsel as in the nature of a closed transaction between the plaintiff and Thomas and as if deeds with covenants of warranty had been executed, each to the other, for the several tracts of land embraced in the exchange. To support his argument the defendant's counsel cited particularly the cases of *Leach* v. *Johnson*, 114 N. C., 87; *Nance* v. *Elliott*, 3 Trial Eq., 408, and *Clanton* v. *Burgess*, 17 N. C., 13.

The facts in each of those cases are in no wise like those in the case before us. In the first cited case nothing was decided except that a purchaser under a contract before the payment of the purchase money was not compelled to take a defective title from the purchaser, the defect having been discovered after the agreement of purchase was made. The Judge who delivered the opinion in that case said that a different principle would apply in case of the discovery of encumbrances before the execution and afterwards for the reason that after the deed had passed, the vendee must rely on his covenant.

In the case of *Clanton* v. *Burgess*, 17 N. C., 13, it is said with approval: "The case cited at the bar of *Abbott* v. *Allen*, (2 Johns, Chapter 519) lays it down that a purchaser who has received a conveyance and is in possession and not disturbed, will not be relieved on the mere ground of defect of title where there was no fraud nor eviction, but must rely on his covenants." There is no question but that the law is correctly laid down in both of these decisions. They mean nothing more than that after a deed for land has been executed and delivered, no fraud or mistake appearing, the vendee must rely on the covenants contained in the deed in case of loss or eviction. But we have a great deal more here that the mere execution and delivery of a deed to land with covenants of warranty. The written agreement of exchange between the plaintiff and Thomas has not been fully executed. The plaintiff has performed his part except that he has not made a deed to the original tract (Germanton tract) to Thomas, because of Thomas's refusal and failure to pay off the encumbrance on the Virginia land, thereby forcing the plaintiff to discharge it himself to protect his title and possession. Thomas or his grantee, if he should undertake to compel the plaintiff to execute to him a deed for the Germanton tract, would be met with the plain equitable demand that he should first reimburse the plaintiff for the money he had been compelled to pay to rid the Virginia lands of the encumbrances upon them and which Thomas should have discharged under the agreement of exchange. That being so, the fact that the plaintiff, Rainey, has become the mover in this action to have the Germanton property impressed with a charge to the extent of the amount which he has been compelled to pay for Thomas to relieve the Virginia lands from lien, does not alter the equities underlying the transaction. The plaintiff still holds the legal title to the Germanton land and is entitled, for the reasons stated, either to the possession of the same or to have it sold and a sufficiency of the proceeds of sale applied to the reimbursement of the plaintiff—the sum which he was compelled to pay to raise the encumbrances. Under all the circumstances connected with the transaction it is more equitable that the last course be adopted.

There was an exception of the defendant to the introduction of the record of the judgment from the Circuit Court of Virginia on the ground "that the record was not a full record." We are to presume that the objection is that the whole of the proceedings, from summons to judgment inclusive, should have been embraced in the record. We think that such is not the law. If a judgment is relied upon to establish any particular state of facts upon which the judgment was based, or as a matter of estoppel, then a duly authenticated copy of the proceedings in which the judgment was rendered ought to be introduced. But, in cases where it is only sought to prove contents and the existence of a judgment, it is only necessary to produce a duly authenticated copy of the judgment itself. *Davidson* v. *Sharp*, 6 Ired., 14; *Edwards* v. *Jones*, 113 N. C., 453; *Gibson* v. *Rob-*

inson, 90 Ga., 756, (16 S. C., Rep. 969); *Anthanium* v. *Bart*, 20 S. E. Rep., 124. The judgment record introduced showed jurisdiction of parties and that it was a lien upon the lands.

There was no error in the ruling of his Honor in allowing the judgment in manner and form as it was rendered to to be entered against Hines and his bondsman Sparger for the rents of the Germanton tract. There is no error in the proceedings below and the judgment is affirmed.

Affirmed.

G. F. RUSSELL and Wife v. ISAAC ROBERTS.

Action to Recover Land—Legal Estate—Sale Under Trust Deed —Purchase through Auctioneer.

1. It is necessary for a plaintiff in an action to recover land, claiming as an heir of an ancestor, to show that such ancestor was the owner of the land at his death; hence, a plaintiff in such action, claiming as the heir of one who at his death had only an equity of redemption, can have no legal estate in the land to support the action.
2. Where a purchaser of land at a sale under a deed of trust procured the autioneer to bid it off for him without the knowledge of the trustee, the sale is not void but voidable only and can be set aside only when the party seeking the rescision is able to place the purchaser in *statu quo* and offers to do so.
3. Where land was sold under the powers contained in a deed of trust and brought a fair price and the money was applied to the payment of the debt secured by the trust deed, the heirs of the trustor have no equity to have the sale set aside for a mere irregularity after the lapse of many years when it would be impossible to place the parties in *statu quo*.

CIVIL ACTION tried before *Starbuck*, *J.*, on a case agreed, at Fall Term, 1897, of DAVIE Superior Court. There was judgment for the plaintiff and defendant appealed. The facts appear in the opinion.

Messrs. A. E. Holton and *Glenn & Manly*, for plaintiff.

Messrs. T. B. Bailey, *Womack & Hayes* and *Watson, Buxton & Watson*, for defendant (appellant).

FURCHES, J.: In 1860 Abraham Pruett being largely indebted, in June of that year executed a deed of trust to T. S. Martin, conveying the lands in controversy and also his personal property to secure the payment of the several debts therein named, amounting to about $5,000. Among the debts so secured was one of $2,000 to John L. Cain for a part of the land conveyed in the deed of trust and for which he had no deed. The trustor Pruett continued to reside on the land so conveyed in trust until the time of his death in 1865; and his family together with the plaintiff's continued to reside thereon for a year or more after the death of Pruett. The trustee, Martin, then took possession of the said land, and in 1868 or '69 sold the same after due advertisement at public outcry to the last and highest bidder, when the defendant became the purchaser at the price of $2,600. The deed of trust contained a power of sale authorizing said Martin trustee to sell, if the debts secured were not paid within one year—and it is not contended that they were so paid.

As the trustor, Pruett, had no deed conveying to him the legal title to the J. L. Cain tract, and none could be had until the purchase money was paid, and as it appears that the trustee had to resort to the Courts to perfect this title, no deed was made to defendant until 1872 when he got a deed for a part of the land, and in 1873 he got a deed for the balance of the land so purchased.

But it is admitted that the property sold for a fair price, that all the purchase money was paid and properly applied to the payment of the debts secured in the trust, $2,000 being applied to the J. L. Cain land debt. The plaintiff Nancy is a daughter of the trustor, Pruett, and she and her husband, G. F. Russell, were married in 1859, and she is now, and has been ever since her said marriage in 1859, a *feme-covert.* The defendant was not personally present at the sale of this land by the trustee, Martin, but had procured one W. A. Roby to attend the sale and to bid the property off for him if it did not bring more than $3,000. The land was sold on the premises as provided in the deed. The trustee, Martin, was present superintending the sale, and after Roby got to the place of sale, the trustee, Martin, not knowing that he had come to bid on the land for the defendant, employed Roby to cry the sale, which he did—bidding for the defendant, until he could get no other bid, and knocked off the land to the defendant at the price stated.

This fact, that Roby acted as the auctioneer and also as the agent of the defendant in bidding for the land, constitutes the ground upon which the plaintiffs ask relief that said sale be set aside and the deeds from the trustee, Martin, to the defendant be declared void and that the same be cancelled.

The deeds from Martin, trustee to defendant conveyed the legal title. This was admitted on the argument and the title relates back to June, 1860, the date of the deed of trust from Pruett to Martin. As the *feme* plaintiff claims, as an heir of Pruett, it is necessary for her to show that he was the owner at the time of his death, as no man has *heirs* while living. Then, as Pruett had no legal estate in the land at the time of his death, the *feme* plaintiff can have none.

Pruett at the time of his death had but an equity of redemption in the land in controversy. *Hemphill* v. *Ross*, 66 N. C., 477; *Parker* v. *Beasley*, 116 N. C., 1.

Where a purchase is made by a third person for a mortgagee, trustee, executor or administrator having the power to sell, the money paid and the deed made, the sale is not void but only voidable, and the legal title passes. *Gibson* v. *Barbuor*, 100 N. C., 192; *Froneberger* v. *Lewis*, 79 N. C., 426; *Sumner* v. *Sessoms*, 94 N. C., 371; *Highsmith* v. *Whitehurst*, 120 N. C., 123.

But this case is not so strong for the plaintiffs as the cases just cited. In this case the trustee did not buy at his own sale by another, and so far as appears, he knew nothing of the fact that Roby was bidding for the defendant until the sale was over.

But the plaintiffs contend that the sale was irregular and voidable for the reason that Roby, the auctioneer, was the agent of the defendant in bidding for the land, and for this contention cite the case (note) *Caswell* v. *Jones*, 20 L. R. A., 503. This note shows that the authorities are somewhat divided as to the law, in cases where an auctioneer bids for an indifferent person at a sale he is crying. But none of them go further than to hold that such sales are voidable. None of them hold that they are void. And this doctrine, that such sales are voidable, if parties interested so elect, while the parties are in *statu quo*, or where the parties asking the rescision are able to place the purchaser in *statu quo*, and propose to do so, seems to be sustained by weight of authority. But this is not the case here. The plaintiffs do not allege their ability or willingness to do this. Indeed we can see that at this great length of time, 28 or 29 years after the sale, it would be impossible to do so.

But what grounds have the plaintiffs to rest their equity upon? We have seen they have no title—never have had. The father of the *feme* plaintiff conveyed the land to Martin in trust to pay his debts. Martin sold as he was authorized to do. The land brought a fair price and every dollar of the money was applied to the payment of the debts of the trustor, and, as we must see from the amount of the indebtedness secured, did not pay anything like all the debts secured. And how it was, or is, that the *feme* plaintiff has an equity in this land after it had been sold by the trustee for a fair price and every dollar of the purchase money properly applied to the payment of her father's debts, to which it had been specially dedicated, we cannot see. *Highsmith* v. *Whitehurst*, *supra.*

It will take more than a mere technical irregularity to warm the conscience of this Court to set aside deeds and upset transactions that have quietly slumbered for so long a time.

There is error and the judgment of the Court below is reversed.

Error.

MARY BIRD v. ALLEN GILLIAM.

Will, Construction of—Devise—Rule in Shelley's Case—"Heirs of Body" Mean "Issue," When.

A testator devised lands as follows: "I loan the land whereon I now live to my daughter Mary during her natural life and give the sane to the heirs of her body, but, if she should have no lawful heirs of her body, the said land at her death shall go back to my son William." *Held*, that the rule in Shelley's case has no application to the estate devised to Mary or William, the expression "heirs of the body," in view of the explanatory words contained in the clause, being construed "issue."

CIVIL ACTION to recover land, tried at September Term, 1897, before *Bryan, J.* There was judgment for the defendant and plaintiff appealed.

Mr. F. D. Winston, for plaintiff (appellant).
Mr. R. B. Peebles, for defendant.

MONTGOMERY, J.: The Courts always give that interpretation to wills which will most effectually carry out the intention of the testator, and there is no exception to this rule but in those cases where the testator uses technical words, which in law have a definite meaning and which are construed under a rule of the law. The defendant insists in the case before us that the testator had made use of certain technical words which in law thwart his intention, and that under the Rule in Shelley's case he, defendant, has a good title to the land conveyed to him by deed hereinafter mentioned.

The following is the clause of the will, the true construction of which will settle the contention between the parties: "I, John Swain, being of sound disposing mind and memory, do this day make this my last will and testament: After my debts are paid the land whereon I now live and in my possession I loan to my wife during her natural life, and at her death I loan the same to my daughter Mary during her natural life and give the same to the heirs of her body, but if my daughter Mary should not have no lawful heirs of her body the said land at her death shall go back to my son William and the heirs of his body." Mary died without issue, and William died without issue before Mary, having conveyed in his life time by deed his interest to Mary. The defendant claims by deed from Mary executed after the deed from William to her. The plaintiff is next of kin and heir at law of the testator.

The Rule in Shelly's case does not apply here. If there had been no words explanatory of the words "heirs of her body" in connection with the estate devised to Mary, she would under the Rule have taken the fee. *Nichols* v. *Gladden*, 117 N. C., 497. But there were such explanatory words where the testator said "but if my daughter Mary should not have no lawful heirs of her body the said land, &c." Such explanatory words have been construed by this Court to mean "*issue.*" *Rollins* v. *Keel*, 115 N. C., 68. Mary then only took a life estate. So, unless the deed from William to Mary conveyed the fee, the defendant has no title to the land.

We are of the opinion that the estate devised to William was a contingent remainder depending upon the determination of the estate of Mary by her death without issue, *Watson* v. *Smith*, 110 N. C., 6, and is not a case for the application of the Rule in Shelley's Case. The contingency happened, for Mary died without issue, but under a proper construction of the will the estate devised to William was only a life estate.

There was error in the judgment of his Honor upon the facts agreed and the judgment is reversed.

Reversed.

M. A. ALLEN, et al. v. R. J. ALLEN and STERLING JOHNSTON.

Executor—Qualification—Will, Construction of—Devise to Executor—Election to Take Under the Will—Charge on Land—Vested Estate—Condition Precedent—Mortgagee—Constructive Notice.

1. Where a testator disposes of property belonging to the executor named in the will and at the same time and in the same will gives to such executor property of the testator, the executor by qualifying as such is held to make an election to take under the will and must execute it in all its provisions, his oath of office being irrevocable on his part.
2. Where land is devised to a person if he will pay a certain sum, and there is no devise over to another, the limitation will be considered a charge upon the land rather than a condition precedent, since the law favors a vesting of estates rather than estates upon such condition.
3. The principle of constructive notice arises out of the duty of an intending purchaser of land to reasonably and in common prudence see that his vendor has, *prima facie*, a good title; and while, because of such duty, he is affected with notice of the provisions of such deeds and other documents as are necessary to show the vendor's title, yet

when he finds upon record a deed to his vendor from the former owner conveying an absolute estate in the land, he is not affected with notice of the provisions of the grantor's will recorded in the Clerk's office executed prior to the deed and devising the land to the grantee in such deed subject to a charge.

4. A testator, after devising certain lands to his wife for life, devised as follows: "If (at her death) my son R. shall think proper to pay $2,000 for all the land and residence that I left to my wife during her life, he shall have the privilege of doing so and he shall have a fee simple right and title to it, to him and his heirs forever." After the execution of the will the testator by deed dated May, 1872, conveyed the land mentioned to his son R. The testator died in 1874 and R. qualified as sole executor of the will. In 1876 R. had the deed recorded and took possession of the land, residing thereon with his mother until her death in May, 1886. In May, 1893, he executed a mortgage upon the land to J., who had no actual notice of the provisions of the will. On October 10, 1893, the plaintiffs who, with R., are the heirs and next of kin of the testator, commenced an action to recover their respective shares of the $2,000 with which they claimed the land to be charged. *Held*, (1) That by qualifying as Executor, R. elected to "take under the will" and took a vested estate in the land mentioned therein charged with the $2,000, as to the collection of which from R. the plaintiffs, except those under disabilities, are barred by the Statute of Limitations. (2) That the mortgage to J., who had no actual or constructive notice of the provisions of the will, is not affected by the charge upon the land but is a first lien thereon.

CIVIL ACTION to have a charge declared upon land in favor of plaintiffs, tried before *Robinson, J.*, upon a case agreed at Fall Term, 1896, of HALIFAX Superior Court. There was judgment for the defendants and plaintiffs appealed.

The facts appear in the opinion.

Messrs. MacRae & Day, for plaintiffs (appellants).

Mr. R. O. Burton, for defendants.

MONTGOMERY, J.: The last will and testament of M. A. Allen, who died in Halifax County on the 9th of September, 1874, was duly admitted to probate in the December following. The will contained a devise to R. J. Allen, the testator's son, of a tract of land of about 200 acres and a legacy of $940. In a codicil the testator uses the following language: "Whereas it is my desire that one of my sons should live at my old residence who bears my family name, in order therefore to place it in their power to do so, I make the following provision in will: If my son R. J. Allen will agree to live at my old residence that I have left my wife during her life, at her death, if my son R. J. Allen shall think proper to pay $2,000 for all the land and residence that I left to my wife during her life, he shall have the privilege of doing so, and he shall have a fee simple right and title to it to him and his heirs forever." The four children of the testator were named executors but R. J. Allen alone qualified. The testator, in May, 1872, more than a year after the date of the execution of the will, made and delivered to R. J. Allen a deed in fee to the tract of land mentioned in the codicil. The grantee took possession of the tract of land in 1876, and in 1893 executed a mortgage upon the same to Sterling Johnston, one of the defendants, to secure a debt of $1,520 due to Johnston.

The first question presented for consideration is whether the simple qualification of R. J. Allen as executor of the will of his father, was *ipso facto* an election by the son to take under the provisions of the will. If such qualification amounts to such election, then the interest of the son in the tract of land described in the codicil is, so far as the son is concerned, derived from the codicil, and the deed is of no avail to him. This is an important question and is raised in its naked simplicity for the first time in this State. Under the common law the answer to the question was ready enough, if not entirely satisfactory. By the act of qualification the executor became vested with the whole personal estate and after the payment of debts and legacies was entitled to the surplus, unless it appeared on the face of the will that the testator did not intend for the executor to have it. Therefore, and under that system, it is manifest that the act of qualifying as executor and taking the oath of office to execute the provisions of the will was irrevocable on his part—and the executor had to proceed to execute the will in all its parts and in its entirety. But the reason of the common law is of no force now, for executors, after the debts and legacies are paid, are trustees of the residuum for the next of kin.

But there is another view which leads us to the same conclusion as that of the common law, and as that view has been considered by this Court we will examine the decisions in reference to the matter:

In *Mendenhall* v. *Mendenhall*, 8 Jones, 287, the Court decided that a widow who qualified as executrix of her deceased husband and took upon herself the execution of the will, waived her right to dissent. The Chief Justice, Pearson, for the Court, mentioned four considerations, all or any of which he said seemed to the Court sufficient to sustain the ruling. Three of these considerations apply with peculiar force to the cases concerning widows in their relations with the estates of their deceased husbands, but one of them appears to us of general application. The chief justice said in that case: "Upon qualifying she assumes the duties and undertakes on oath to carry into effect the several provisions of the will, and it is inconsistent afterwards to do an act which defeats or in a great degree deranges the provisions of the will and disappoints the intention of the testator therein expressed." This ruling is affirmed in *Syme* v. *Badger*, 92 N. C., 706.

In *Yorkly* v. *Stinson*, 97 N. C., 236, the opinion in reference to the case of *Mendenhall* v. *Mendenhall* and *Syme* v. *Badger*, *supra*, is in the following language: "But in these cases the estoppel was held to apply to a widow who was appointed to execute the will and of course in all of its provisions, and who accepted the office and undertook to carry out its directions with which the legal effect of a dissent was wholly inconsistent.

The subject is considered in the last cited case and leaves nothing now to be added."

It seems to us from the reasoning in the cases above cited (although in those cases the personal representatives were widows qualifying upon the estates of their deceased husbands under wills) that this Court has decided that the same principle would apply to the qualification of any person as executor; that the taking of the oath of the office of executor is irrevocable on his part; that he must execute the will in all of its provisions, and that, therefore, by such qualification he makes his election to take under the will where the testator has disposed of property belonging to the executor and at the same time and in the same will has given to the executor property of the testator.

The executor, R. J. Allen, having elected then, by his qualification, to take the land described in the codicil, the effect of this upon the interest of the defendant Johnston is next to be considered—the question involving the doctrine of constructive notice. Did Johnston have such notice of the will of the testator, Allen? He did not have actual notice as appears in the case agreed. We think he is not bound constructively with knowledge of the contents of the will. The principle of constructive notice arises out of the duty of any would be purchaser to reasonably, and in common prudence, see that his vendor has a prima facie good title; and because of this duty the purchaser will be affected with notice of the provisions of such deeds and other documents as are necessary to show the vendor's title. It was incumbent then upon Johnston to see to the right of R. J. Allen to convey the land to him. He reasonably would have performed his duty if he had consulted, in the first place, the office of the register of deeds of Halifax County. He would have found there on registration a deed from the testator to R. J. Allen conveying the land mentioned in the codicil. He would not then have been required to look further. If the defendant Johnston, after he had examined the register's office, had been informed that the testator had left a will, the reasonable presumption would have been that the testator had not devised that which he had already conveyed by solemn deed.

We are of the opinion, therefore, that the mortgage, described in the case agreed and which was executed by the defendant Allen to the defendant Johnston, is a first lien upon the land.

The last question for our determination is as to the nature of R. J. Allen's interest in the land described in the codicil, that is, whether it was an estate upon condition or a fee simple in remainder charged with the payment of the $2,000 mentioned in the codicil. Whatever interest it may be when considered as between R. J. Allen and his next of kin, it is subject in the first place to the debt and mortgage of Johnston for the reasons already given. The intention of the testator as to whether he intended that the estate in the land should vest as a remainder in fee in his son R. J. Allen charged with the amount named in the codicil, or whether he intended that R. J. Allen should pay the amount for the benefit of the estate before the interest in the land should vest, is not clear. That being in doubt, we are disposed to adopt the first view, because the law favors the vesting of estates and leans to a view of a charge rather than to that of a condition precedent. Besides, there is no devise over to any other person, and in *Woods* v. *Woods*, 44 N. C., 290, this circumstance is declared to be a strong reason for giving to such words of limitation the idea of a charge rather than of a condition precedent. We think, then, that the testator by his language intended to devise the land *i. e.*, the remainder in fee after the death of the widow, to his son R. J. Allen, *provided* he should pay to the estate $2,000. That being so, R. J. Allen took a vested estate. *Woods* v. *Woods*, *supra*; *Aston* v. *Galloway*, 38 N. C., 126; *Whitehead* v. *Thompson*, 79 N. C., 450; *Patterson* v. *Patterson*, 63 N. C., 322. *Erwin* v. *Erwin*, 115 N. C., 366, to the contrary, is in conflict with the decisions of this Court and is a *dictum*, purely.

Considering then, that the estate was vested in R. J. Allen and that the $2,000 mentioned in the codicil was a charge upon the land, the plea of the Statute of Limitations set up by the defendants is a bar to the plaintiff's action, except as to Mrs. House. *Rice* v. *Rice*, 115 N. C., 43. Mrs. House therefore is entitled to one fourth of the amount charged upon the estate, but the debt secured by the mortgage of R. J. Allen to Sterling Johnston is a first encumbrance on the land.

To summarize, our conclusion is that R. J. Allen, by the act of qualifying as executor, elected to take under the will; that the estate mentioned in the codicil was not a conditional one but a vested interest charged with the amount mentioned in the codicil; that the plaintiffs, except Mrs. House, are barred by the Statute of Limitations, and that Mrs. House is entitled to one fourth of the amount charged upon the land, but that she is to recover no part of her share until the debt of Sterling Johnston secured by the mortgage shall have been paid, that debt and mortgage being a first lien.

The judgment of the Court below is reversed, and the case is remanded to be proceeded with according to law under this decision.

Reversed.

CLARK, J., concurring: I concur that the mortgage to Sterling Johnston is valid. Seeing the deed from M. A.

Allen to R. J. Allen on the records of the Register's office, he was not required to examine the will book to ascertain whether M. A. Allen had not devised the land to some one else after conveying it by deed to R. J. Allen.

R. J. Allen, having qualified as executor under the will of M. A. Allen, is bound to execute it as far as lies in his power. He was also a legatee in the will. He cannot claim "under the will and against it." By qualifying, he made his election. Now, what did the will direct as to the home place which had already been conveyed to him? It directed, first, that the testator's wife should have it for life. R. J. Allen is bound by that. Had it directed that at her death it should go to some one else, R. J. Allen would have been bound by it. Had it directed that at her death R. J. Allen should take it and pay $2,000 upon it, the $2,000 would have been a charge upon it. But none of these things did the will require. It provides that as to the land given to his wife "at her death"—not before—"if said R. J. Allen shall think proper to pay $2,000" for the land which had been left to the wife during her life "he shall have the privilege of doing so." Now, by qualifying as executor he assented that M. A. Allen's disposition of the land is valid. That disposition is to the testator's wife for life and "at her death" an option to R. J. Allen to take the land if he shall pay the sum of $2,000. Being an option he could exercise his choice either way, and still execute the will. If he had exercised this option by declining the land upon those terms, it would have been in accordance with the will, not against it, and the land would have gone into the residuary clause, if one, and, if not, the testator would have been intestate as to the remainder in said land on which the option was given R. J. Allen.

At the death of the wife of the testator, he elected to take the realty, which thereupon became charged with the aforesaid sum of $2,000 with interest from that date, said charge being subordinate, however, to the mortgage executed to Sterling Johnston. The time elapsing since the death of the testator's wife (in 1878) at which time R. J. Allen by the terms of the will "at her death" was given the option to take the property subject to the charge, or let it alone, has been sufficient to bar the plaintiff's claim upon said $2,000 except as to Mrs. House.

FAIRCLOTH, C. J., and DOUGLAS, J., dissent.

In Re DANIEL BURNS' WILL.

Devisavit Vel Non—Sanity of Testator—Undue Influence—Trial—Evidence.

1. Where, in the trial of an issue of *devisavit vel non*, the sanity of the testator is impeached, the burden of proof is upon the caveators.
2. Where on trial of an issue of *devisavit vel non*, proof of the sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one to whom he left all his property, is competent evidence to be passed upon by the jury as bearing upon the capacity of the testator and, hence, is as much the proper subject of discussion by counsel, in the argument, as any other part of the testimony. (Montgomery, J., dissenting).

ISSUE of *devisavit vel non* tried before *Robinson, J.*, and a jury at June, 1897, Special Term of BURKE Superior Court. The facts appear in the opinion. There was a verdict for the propounders of the will and from the judgment thereon the caveators appealed.

Mr. S. J. Ervin, for caveators (appellants).
Messrs. E. J. Justice and *J. T. Perkins, contra.*

FAIRCLOTH, C. J.: The issue was *devisavit vel non.* Daniel Burns, aged 75 or 80 years, died in 1893, leaving eight children him surviving. He also left a last will, dated in 1889, in which he devised and bequeathed his entire property to his son, Phil. F. Burns. The will having been proved in common form the burden was upon the caveators to show incapacity of the testator. *Mayo* v. *Jones*, 78 N. C., 402. Sanity being the natural and usual condition of the mind, whoever alleges any matter in derogation thereof must prove it.

Numerous witnesses were examined at the trial, the evidence of some of them tending to prove sanity, and that of others to prove insanity. This evidence consisted of the opinion of witnesses, the conduct and language of the testator at different times, from a time recently before the date of the will running back to about the close of the late war, when he received a severe blow on his head. The caveators also offered some evidence of undue influence on the mind of the testator, imposed by the devisee named in the will, who lived with his father after the death of his wife. During the argument, the caveators' counsel proceeded to discuss the circumstance that the deceased had disinherited his seven children, as bearing on his mental condition when he made his will. The propounders' objection to such argument was sustained. Exception. The counsel again in his argument alluded to the circumstance that seven children were disinherited, and on objection his Honor stated that "that circumstance had nothing to do with the case, and that counsel for caveators had no right to allude to it in the argument." Exception. That view of his Honor was erroneous.

It is not denied that declarations of the testator made at the time of signing the will are competent. They are a part of the *res gestae*. 1 Thomas Coke 761, 763,n. The declarations and conduct of the testator, both before and after he signed the will, are competent as to the condition of his mind at the time he signed it. They are the pointers to the controlling fact involved in the issue to be submitted to the judgment and discretion of the jury as rational men. These acts and declarations are not received as a part of the *res gestae* but whether made long before or after making the will is immaterial, as to their *competency*. They are circumstances uttered by one having an interest, going to the jury with such weight and credit as that tribunal may give them, whose province it is to try the facts and also to pass upon the truth of these circumstances. And we hold that where proof, tending to prove sanity or insanity, is submitted to the jury, the fact of disinheritance is a circumstance competent to go to the jury, as was done in this case, the value of this circumstance to be determined by the jury, as they do with the other circumstances. The right to dispose of one's property, disinheriting any or all of his or her children, is not controverted in the least degree, but where the capacity in the testator to dispose of his property to any one is raised by the issue, then the circumstances enumerated are highly useful to the jury in their search for the truth of the matter. *Reed* v. *Reed*, 8 N. C., 248; *Howell* v. *Barden*, 3 Devereaux, 442.

Evidence of fraud *or imposition* in the execution of an instrument, as a will, may be considered by the jury. *Rose* v. *Christman*, 23 N. C., 209. Evidence of kindly relations between the testator and members of his family is competent on his alleged mental incapacity. *Bost* v. *Bost*, 87 N. C., 477.

We have referred to these authorities because it is not clear whether his Honor held that the fact of disinheritance in this case was incompetent, or whether he considered it unimportant for the jury to consider. That fact being in evidence, it was as much the subject of discussion by counsel as any other part of the evidence. *Code,* Section 30.

As a new trial must be ordered, we leave the other exceptions out of this opinion, as they may not and probably will not arise again.

Error.

MONTGOMERY, J., dissents.

DENNIS CALDWELL v. MORGANTON MANUFACTURING COMPANY.

Action for Trespass—Injunction—Deeds of Corporation—Defective Execution—Evidence.

1. An instrument purporting to be the deed of a corporation and executed in its name by its President with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under Section 685 of *The Code.* Such deed is only the personal act of the President, and is not admissible in evidence to prove a conveyance by the corporation
2. An instrument purporting to be the deed of a corporation, signed by the President and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under Section 685 of *The Code,* for lack of the common seal, and, for the lack of such seal and attestation by Secretary, is not good at common law.
3. A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself.
4. In the trial of an action for trespass in which defendant set up as a defence the ownership of an easement in the land, a deed executed to it in correction of former defective deeds was properly rejected as evidence of title where the trespass occurred before the corrected deed and after the delivery of the defective deeds.
5. Where, in an action for trespass, plaintiff prayed for an injunction, a deed to the defendant executed after the trespass should have been considered by the Court in determining the right to the injunction

CIVIL ACTION for trespass tried before *Robinson, J.*, and a jury at June, 1897, (Special) Term of BURKE Superior Court. There was judgment for the plaintiff and defendant appealed.

Messrs. Avery & Avery, for plaintiff.
Mr. S. J. Ervin, for defendant (appellant).

MONTGOMERY, J.: This action was commenced to recover damages for an alleged trespass by the defendant company upon the lands of the plaintiff, the trespass in the language of the complaint being "for the entering upon and breaking of his close by defendant, the digging up of his land, and the building of a dam thereon for the purpose of running water across the land to be used by defendant in operating a brick-yard." The defendant denied the injury and trespass, and claimed to be the absolute owner of the easement in the land conveyed by Walton to the Asylum.

On the 15th of March, 1886, T. G. Walton, in consideration of $50, conveyed by deed to the Western North Carolina Insane Asylum the full and free use of the water of a certain branch running through a tract of land belonging to the grantor in the County of Burke, with full power on the part of the grantee and its assigns to enter upon the lands conveyed, to convey from the branch such an amount of water by pipes, ditches or otherwise over and through the lands to a brick-yard belonging to the grantee, as might be necessary for manufacturing brick at the brick-yard. The plaintiff in this action received from Walton a deed dated June 27, 1895, for part of the above described tract of land over which the easement in the nature of the water-way was granted, the deed containing a provision in these words, "Subject to the right heretofore made to The Western North Carolina Insane Asylum to convey the water over said land." As evidence of title and ownership of the easement, the defendant offered three deeds, the first was from the Western

North Carolina Insane Asylum to S. McD. Tate and John A. Dickinson, purporting to convey the easement, dated December 10, 1890. This evidence was rejected, and the refusal of his Honor to admit it, is the defendant's first exception.

The deed was executed in the name of the Western North Carolina Insane Asylum by J. W. Wilson, President, with the word "seal" at the end of the signature. That was not a good execution of the deed either at common law or under our statutory provision, *Code*, Section 685, concerning the manner of the execution of deeds by corporations. That deed was simply the personal act of the President. *Clayton* v *Cagle*, 97 N. C., 300.

The next deed offered was from the State Hospital (the changed name of the The Western N. C. Insane Asylum) to Tate and Dickinson, purporting to convey the easement, dated May 7, 1892. That deed was rejected and its rejection constitutes the second exception of the defendant. It ought not to have been received, as evidence, for the reason that there was an attempt to comply with Section 685 of *The Code*, the law then in force, and a failure to do so. It was signed by the President and two members of the company but it did not have the common seal of the company attached. The execution was not good at common law for the reason that, although signed by the President, it was not attested by the Secretary of the company with the common seal affixed.

The third deed was one from the State Hospital to the defendant Company, dated September 9, 1896, containing a recital of the first two deeds and the purpose of the grantor to convey the easement and the failure to do so on account of the faulty execution of the deeds and conveying the easement. This deed was signed by the President of the board of directors, attested by the Secretary of the company and had the common seal attached. Its execution was therefore sufficient and valid under Section 685 of *The Code* as amended by Chapter 95 of the Acts of 1893. It also contained a recital that it was executed in pursuance of an order of the board of directors. That recital dispensed with the necessity of proving the action of the board otherwise than by the deed itself. It was rejected by his Honor, however, and properly rejected for the purposes for which it was offered. The easement was conveyed by the deed, but the injury and trespass occurred before the execution of the deed. If the defence of the defendant had been that it was using this easement at the time of the trespass, as alleged in the complaint, as the licensee of the grantor State Hospital, and not as the owner of the easement in its own right, this last mentioned deed with its recitals would have been competent evidence going to show the use of the easement by the defendant with the consent and license of the grantor.

We need not consider the special instructions prayed for by the defendant, for they were based upon the sufficiency of the legal execution of the first two deeds. The execution of the deed of the 9th of September, 1896, by the State Hospital to the defendant being properly made and conveying the easement mentioned therein, ought to have been considered by his Honor in connection with the hearing of the injunction. The easement was at that time the property of the defendant; it had a right to use it with the same privileges and rights attaching to it under the deed from Walton to the Western N. C. Insane Asylum, and the injunction ought to have been dissolved. The judgment below in respect to the injunction is reversed, while the other part is affirmed.

Modified and affirmed.

FAIRCLOTH, C. J., and FURCHES, J., dissent.

W. H. WORTH, State Treasurer, v. PIEDMONT BANK of Morganton.

Insolvent Bank—Receiver, Appointment of—Conflicting Appointment of Receivers—Priority—Jurisdiction—Contempt.

1. Ordinarily, a motion for the appointment of a Receiver must be made before the resident Judge of a district or one assigned to the district or holding the Courts thereof by exchange, at the option of the mover; but it may be made before any other Judge, in which case the order, if granted, must be made returnable before one of such Judges.

2. Under Chapter 155, Acts of 1891, as amended by Chapter 478, Acts of 1893, requiring the State Treasurer to appoint some one to examine and report on the condition of the State banks and if it appears from such report that a bank is insolvent or in imminent danger of insolvency, to institute proceedings in the Superior Court of Wake County for winding up its affairs, and for the appointment of a receiver according to law, application for the appointment of such receiver may be made before the resident Judge or the Judge holding the Courts, by assignment or exchange of the Judicial District in which Wake County is situated.

3 In such case, it can make no difference in the Treasurer's right to make such application, that the examiner did not make his report until the insolvency of the Bank was publicly known.

4. The Acts of 1891 (Chapter 155,) and of 1893 (Chapter 478,) do not give to the State Treasurer the exclusive right to institute proceedings for a receiver so as to take away the right of any creditor, by a general creditors' bill, to begin an action for that purpose in the Superior Court of the County where the bank is situated

5 Where proper proceedings for the appointment of a receiver are begun in two different Courts and a different receiver is appointed in each case, this Court, in determining the priority of appointment, as between the receivers, will take notice of fractions of a day.

6. The Court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other Courts of concurrent jurisdiction; and, hence, where permanent receivers were appointed in separate proceedings by different Courts having equal authority to appoint, the test of prior jurisdiction is not the first issuing of the summons, nor the first preparation and verification of the papers, nor which receiver first took possession, but which Court was first "seized of jurisdiction," by making an order upon legal proceedings exhibited before it, as by the appointment of a temporary receiver

7. Where C. and W. were respectively appointed receivers by two separate

Courts having equal jurisdiction, and W. took possession of the property in suit under order of Court and refused, on demand, to deliver up possession to C. who was subsequently declared rightfully appointed and entitled to possession; and it appeared that W. acted in good faith and under an order of Court which he considered valid; *Held*, That W. is not punishable for contempt of Court in refusing to deliver the property until the question of priority of right should be decided.

CIVIL ACTION, brought in the Superior Court of WAKE County by W. H. Worth, State Treasurer, against the Piedmont Bank of Morganton, for the winding up the affairs of the Bank and the appointment of a receiver, and heard before *Robinson, J.*, at Chambers, on the 11th day of December, 1897, on a motion to appoint a permanent receiver, and on affidavits of W. E. Walton and others, in answer to a rule on said Walton why he should not be adjudged in contempt for refusing to deliver possession of the property of defendant Bank to A. D. Cowles, who had been appointed temporary receiver by *Robinson, J.*, on the 3rd of December, 1897.

From the record it appears that the doors of the defendant bank were closed in the forenoon of December 2nd, 1897. On the same day the plaintiff, the Treasurer of North Carolina, by virtue of the Statute, (Chapter 155, Acts of 1891, and Chapter 478, Acts of 1893), hereinafter mentioned, and also as a creditor of the insolvent bank, brought an action in the Superior Court of Wake County for the purpose of winding up the affairs of the bank and of having a receiver appointed. This summons was issued on December 2nd, but the hour at which it was issued does not appear. On the same day, but at what hour does not appear, the complaint in the record was filed and verified. On the 3rd of December, 1897, at 9:45 A. M., Judge Robinson of the 4th Judicial District, made an order appointing A. D. Cowles temporary receiver of the bank. This order was made returnable on December 18th. Upon the affidavits of A. D.

Cowles and S. L. Crowder, with exhibits attached, on December 8th, at 7 P. M., Judge Robinson made an order returnable on Saturday, December 11th, at Goldsboro, in the 4th Judicial District, at 2 P. M., directing the bank to show cause why a permanent receiver should not be appointed on that date, and why the order returnable on the 18th should not be expedited; and finding as a fact that it was necessary to make an order returnable on the 11th. The order also directed W. E. Walton to show cause on that date why he should not be adjudged in contempt for interfering with the possession of the temporary receiver A. D. Cowles. On the 11th of December at 4 P. M., the motions were heard, and an order appointing A. D. Cowles permanent receiver, and directing W. E. Walton to turn over to him the assets of the bank, and giving leave to the plaintiff and to Cowles to apply for relief in case Walton should refuse compliance with the order was signed.

On December 2d, the hour not appearing, T. M. Webb, Sheriff of Burke County, I. I. Davis and others filed a creditor's bill against the Piedmont Bank. The complaint in this action, asking for the appointment of a temporary receiver, etc., is dated December 2nd. The hour does not appear. Copies of the summons and complaint were delivered to an officer of the defendant bank by the plaintiff, who was also Sheriff of Burke County. This complaint was taken to Judge Green, then at Boone. On December 3rd the affidavit which appears in the record was presented to Judge Hoke, who had come to Morganton for the purpose of hearing the motion, and at 6:45 P. M., he made an order appointing W. E. Walton temporary receiver. On the same day the order reached Judge Green, who, after the appointment of Walton, and in ignorance of it, appointed I. I. Davis temporary receiver. The order of Judge Hoke was made returnable before Judge Green at Lenoir on December 15th.

It was served by the Coroner upon the bank on December 4th. On that date Mr. Walton gave bond and demanded that the Bank Examiner, Crowder, who was in physical possession of the assets of the bank, should surrender them to him. This was declined by Crowder. On the evening of the 4th of December, after dark, while Crowder was absent from the banking house, the Coroner and the receiver having obtained duplicate keys from the officers of the bank, proceeded to take physical possession of the bank; they put an additional lock upon its doors and thereafter excluded the Bank Examiner from any possession of the bank or its assets.

On the 7th of December Judge Green ratified Judge Hoke's order appointing Walton, accepted the resignation of I. I. Davis, and made an order to show cause why a permanent receiver should not be appointed, returnable on the 15th. On December 10th at 8 P. M., after the service of the order of Judge Robinson upon receiver Walton, the notice appearing in the record in the Webb case was presented to an officer of the bank and service accepted. The order required it to show cause the next day in Boone why a permanent receiver should not be appointed. The order appointing the permanent receiver was made by Judge Green on the 11th, prior to the appointment of a permanent receiver by Judge Robinson.

From the order of his Honor, *Robinson, J.*, appointing A. D. Cowles permanent receiver, and holding that the appointment of W. L. Walton by Judge Green, as temporary receiver, was subsequent to the appointment of Cowles as temporary receiver, and directing said Walton to turn over the property of the defendant Bank to said Cowles, receiver, W. L. Walton appealed.

Mr. E. J. Justice, for Walton, appellant.
Mr. F. H. Busbee, for Treasurer.

CLARK, J.: Ordinarily the motion for a receiver must be made before the resident Judge of the District, or one assigned to the District or holding the Courts thereof by exchange, at the option of the mover. *Code*, Sections 379, 336; *Corbin* v. *Berry*, 83 N. C., 27. Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other Judge than one of those just named, the order must be made returnable before one of such Judges. *Galbreath* v. *Everett*, 84 N. C., 546; *Hamilton* v. *Icard*, 112 N. C., 589. The Acts of 1891, Chapter 55, amended by Acts of 1893, Chapter 478, makes it the duty of the State Treasurer to appoint some one to make examination of the condition of the State Banks, banking institutions and bankers referred to in that Statute, and report thereon, and "if on such report it shall appear to the State Treasurer that any bank, banking institution or banker is insolvent or in imminent danger of insolvency, or is guilty of fraud, fraudulent practices or concealments, the said Treasurer shall institute proceedings in the Superior Court of Wake county for the purpose of winding up and settling the affairs of the said bank, banking institution or banker, and for the appointment of a receiver thereof according to law." Under this Act an application by the Treasurer for the appointment of a receiver could be made to the resident Judge or the Judge holding the Courts by assignment or exchange, of the Judicial district in which Wake county is situated. It can make no difference in the Treasurer's right to make the application, that the examiner did not make such report till the insolvency of the bank was publicly known. If the report had been made earlier it would have been simply the Treasurer's duty to have moved earlier.

But we see nothing in the Act which, by a just construction, gives the Treasurer the exclusive right to institute proceedings for a receiver, etc., nor which takes away the right of any creditor, by a general creditor's bill, to begin an action for that purpose. The only difference is that the Treasurer by means of his examiner may have earlier information than others, and it is made his official duty to take appropriate steps to wind up the bank, whenever by the examiner's report it appears to him that "it is insolvent or in imminent danger of insolvency, or is guilty of fraud, fraudulent practices or concealments," but that does not specify that if he moves it shall invalidate proceedings already taken by creditors for that purpose under the general law.

The proceedings by Webb and other creditors, and that by the Treasurer were equally authorized by Statute. The only inquiry therefore is as to which obtained the priority, for only one proceeding for the purpose can be tolerated, and in determining the question of priority in such cases the Court will take notice of fractions of a day. *People* v. *Bank*, 35 How. Pr., 428; S. C., 53 Barb. 412.

The summons in the proceeding instituted by Worth, Treas., was issued on the 2nd of December, but a few hours later than the summons issued on the same day in the proceeding begun by Webb and others. On the other hand, the order appointing a temporary receiver was made by Judge Robinson in Treasurer Worth's suit at 9.45 a. m. Dec. 3, and at 6.45 p. m. the same day Judge Hoke appointed a temporary receiver in the suit brought by Webb and others. The permanent receiver was appointed in the Treasurer's suit on December 11, a few hours later than the appointment on the same day of the permanent receiver by Judge Greene in Webb's suit. The temporary and permanent receiver appointed in the Webb suit took and still holds possession of the assets.

The test of jurisdiction in such cases is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, nor which receiver first took possession (*People* v. *Bank*, *supra*) since that has no effect unless legally authorized (which it cannot be if a prior order has been made appointing another), but which Court is first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it. "That Court which first takes cognizance of the controversy is entitled to retain jurisdiction until the end of the litigation to the exclusion of all interference by other Courts of concurrent jurisdiction." Gluck & Becker on Rec. Sec. 430. "Priority as between receivers is determined by reference to the date of appointment since the Court will not permit both to act." High on Rec. Sec. 162. "The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance." Beach on Rec. Sec. 200; *Wilson* v. *Allen*, 6 Barb. (N. Y.) 542; *Storm* v. *Waddell*, 2 Sandf. 494. The first order was made by Judge Robinson appointing a temporary receiver and he retains the jurisdiction then acquired. *Childs* v. *Martin*, 69 N. C., 126; *Young* v. *Rollins*, 85 N. C., 485. Walton, however, was properly not punished for contempt. As was said in *People* v. *Bank*, *supra*, "he appears to have acted in good faith, and had the authority of an order of the Court, which he was probably entitled to regard as valid, until pronounced otherwise on a question of priority by a competent tribunal." That decision being now pronounced, it will be his duty to obey it and deliver over the assets to the receiver appointed by the Court which first acquired jurisdiction, *i. e.*, Cowles.

The order of Judge Robinson of December 11, 1897, is in all respects affirmed.

Affirmed.

Upon the filing of the opinion in the above case, the plaintiff filed the following motion:

"The plaintiff herein, upon the facts presented in the pleadings and upon the opinion of the Court filed herein, moves that judgment be entered in this Court directing the respondent, W. E. Walton, to deliver to Andrew D. Cowles, receiver, the assets of the defendant bank, real and personal, under the decision of the Court, and for costs, and in default of the delivery of the said assets to said Cowles by respondent, that an execution issue to the proper officer to place the said Andrew D. Cowles, receiver, in possession of said assets.

(Signed). F. H. BUSBEE,
Solicitor for plaintiff."

Thereupon the following judgment was rendered:

"In this cause upon motion of the counsel for plaintiff, it is ordered and adjudged that William E. Walton, respondent to the notice and rule served upon him and the appellant herein, surrender to Andrew D. Cowles, receiver of The Piedmont Bank, legally appointed by Judge Robinson, all the assets of the defendant Bank in his possession, real and personal, or in anywise subject to his control upon demand of said Cowles, and that, if deemed necessary upon demand of plaintiff, execution issue to the Sheriff of Burke County to place the said Andrew D. Cowles, receiver, in possession of said assets, and that said W. E. Walton pay the costs of this appeal.

(Signed). W. T. FAIRCLOTH,
Chief Justice."

W. H. SMITH v. CITY OF GOLDSBORO.

Mandamus—City Improvements—Streets—Additional Servitude—Reference—Practice.

1. The use of a street for laying pipes, &c., in furnishing water, lights, &c., does not impose any additional servitude beyond those reasonably included in the dedication of all streets.

2. Where plaintiff, while owner of lands adjacent to a City, platted and divided the same into "lots" and "streets" and sold all the lots to purchasers but made no conveyance of the streets, and subsequently the corporate limits of the City were extended so as to include the lands; *Held*, that the plaintiff is entitled to no damages against the City for using the streets to fulfill its duty to the purchasers of the lots in furnishing them water and lights, such use not creating any additional servitude not contemplated by their dedication.
3. Where, in an action, there is a plea in bar, no reference should be ordered until such plea is determined; hence,
4. Where, in an action for damages against a City for the use of streets dedicated by the owner of suburban lands and subsequently included within the corporate limits of the City, the defendant denied the plaintiff's right to any damages, it was error to appoint an arbitrator pursuant to the City charter and ordinances, to assess the damages before the determination of the plea in bar.

ACTION for mandamus by the plaintiff to compel the City of Goldsboro to appoint an arbitrator in pursuance of its charter and ordinances to assess damages claimed by plaintiff for use of his streets, heard before *Robinson, J.*, at CHAMBERS in Goldsboro in September, 1897. From a judgment for plaintiff defendant appealed.

Messrs. W. C. Monroe and *Aycock & Daniels*, for plaintiff.
Messrs. Allen & Dortch, for defendant (appellant).

DOUGLAS, J.: This is a proceeding for a mandamus to compel the defendant municipal corporation to appoint an arbitrator, in accordance with its ordinances and charter, to assess the damages claimed by the plaintiff for the additional servitude imposed upon certain streets, the fee of which was alleged to be in the plaintiff. There seems to have been no question as to the facts, as no issues were submitted or asked to be submitted to the jury. The Court held as a conclusion of law that the defendant should appoint an arbitrator as prayed in the complaint. The essential facts appear as follows:

The plaintiff about the year 1881 bought a large body of land lying East of William street and North of the extension of Ashe street, which is now situated on what is known as the extension of Ash street, Daisy street, Parsonage street and Gardner street; including the land on which said Daisy street, Parsonage street and Gardner street run, and including land on which the extension of Ash street runs to the big ditch, excepting about ⅓ of said street, lying on the South of said street. The Eastern limits of the City of Goldsboro at that time and up to the year 1895 were three hundred feet from the Eastern limit of William street. After the purchase of said land, the plaintiff had the same surveyed and platted, and in such survey streets were laid off and clearly defined, and the land adjoining said streets was divided into lots. Said lots were offered for sale by the plaintiff as defined in said survey, and the same were sold and conveyed by the plaintiff for value to different parties. All of said lands described in the complaint have since then been sold off and conveyed in lots by the plaintiff, except so much thereof as is embraced in said streets, and, in the deeds conveying the lots, the streets are designated and called for. Since the survey and since the conveyance of the lots, all of the land has been embraced within the corporate limits of the City, which provides for its citizens electric lights and water, *as it is its duty to do*, and the owners of the lots, the grantees of the plaintiff or purchasers from such grantees, have petitioned the defendant to furnish them water and lights. Upon consideration of the petition, and being advised that the conduct of the plaintiff was a dedication of said streets to the public, the defendant has taken possession of said streets in order that it may perform its duty to its citizens and furnish water and lights to the owners of said lots.

The plaintiff contends that he dedicated the said streets as "suburban" and not as "urban" ways, and that therefore he is entitled to compensation for any additional servitude imposed upon said streets other than their use as County roads.

We see no merit in this contention, either in law or in fact. It was evidently the intention of the plaintiff, not to open a road for the convenience of the neighborhood, but as stated in his complaint to lay off and open up *streets* for the purpose of giving the purchasers of said *lots* the right of way over the same. In other words, he opened streets to induce parties to purchase the lots, which they would not have done had not the streets been opened. While he may have retained the fee of the streets inasmuch as he did not convey it to any one, he could not have expected any personal benefit therefrom, as he now is not even an abutting owner, as appears from the record. He was fortunate in being able to dispose of all his lots at prices presumably satisfactory to himself. This, which would otherwise have been impossible, he was enabled to do by opening the streets in controversy, and he should not now be heard to assert any ownership in said streets to the injury of the parties whom he thus induced to purchase. The very words "streets" and "lots" indicate the purpose and nature of the dedication. The land was then situated within three hundred feet of the corporate limits of the city of Goldsboro, a growing town, and has since been by it absorbed, as was probably anticipated. One of the plaintiff's streets appears to have been a mere extension of Ash street. The dedication of these streets might have been recalled before any act of acceptance by the city, provided no rights had vested by the sale of lots fronting thereon, or of lots sold by him tributary thereto, as was the case in *State* v. *Fisher*, 117 N. C., 733, but in this case *all* the lots have been sold. The purchasers, buying after the opening of the streets and depending thereon for the enjoyment of their property, were entitled to their unrestricted use for all legitimate purposes, present and prospective. Having been taken within the corporate limits of the city of Goldsboro, they are subject to all the burdens and entitled to all the benefits of citizenship. Paying city taxes, they have asked for two of the greatest advantages of the city, water and lights, and this the city was preparing to give them, but for the interference of the plaintiff. Such interference is without warrant in law and cannot be sustained upon any principle of equity.

The expressions "urban" and "suburban ways" are not in general use among our people. We generally say "street" and "road." If A offer to sell a lot to B and tell him that the vacant strip of land in front of it is a street, B knows exactly what is meant and acts accordingly. A cannot be heard to say long years afterwards that by the word "street" he simply meant a "suburban way," and that his vendee B must rest content with the privileges of a countryman, while bearing the burdens of a townsman. The use of a street in furnishing water and light, which add so much to the comfort and convenience of the citizens, does not impose any additional servitude beyond those reasonably included in the dedication of all streets.

As the plaintiff is equitably estopped from denying to his vendees any use of the streets reasonably necessary to the use of the land he sold to them, he is equally estopped from denying to the city the right to furnish to his vendees what is so essentially necessary to their health and comfort or the lawful enjoyment of their property. That he is estopped as to his vendees scarcely needs citation of authority. *Moose* v. *Carson*, 104 N. C., 431, and cases therein cited; *State* v. *Fisher*, 117 N. C., 733; *Grogan* v. *Town of Haywood*, 4 Fed. Rep., 164.

The following quotations from Elliott on Roads and Streets are sustained by numerous authorities on page 12: "A street is a road or public way in a city, town or village." On page 14: "If an owner of land makes a plat of a city or town and refers to streets, he must be taken to mean public urban ways in all that the term implies. He sets apart, by such an act, the land indicated as a street to all the public uses to which a public urban way may be properly appropriated. The easement thus created is determined by applying to the word "street" the significance usually assigned to it by law. If property in the line of a way designated as a street is acquired on the faith of the owner's act, he will not be permitted, as against the persons so acquiring the property, to defeat by his own act their right to have it regarded as a street with all the usual and appropriate incidents of such a public highway." On page 16: "The right of the public in a street is by no means confined to the surface of the way, and this, all who set apart land for a street are conclusively presumed to know." On page 89: "An owner who makes a plat on which spaces are left indicating the dedication of roads or streets, and sells lots with reference to the plat, can not recall his dedication, for he leaves the streets to be opened by the proper local authorities at such a time as the public interest may require, and of this the local authorities are the judges. It is for them to determine when the public interests demand that the ways as laid out on the plat shall be taken in charge and improved for public use, but the ways as to those who have purchased lots exist from the time of their purchase." On page 15: "It is a familiar rule, illustrated by a great throng of cases, that one who names a street in a deed conveying a town or city lot is held to mean a public urban way." In Mills on Em. Domain, Section 56, the author says: "Streets may be used for pipes, &c., and the original compensation is supposed to cover damages for all such uses, and, in case of a dedication of the street, the owner is presumed to have contemplated such a use." In *Warren* v. *Grand Haven*, 30 Michigan, 28, Judge Cooley says: "The dedication of land to the purposes of a street must be understood as made and accepted with the expectation that it may be required for other purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which village or city streets are usually devoted, as the wants or convenience of the people may render necessary or important."

In spite of our population we have no large cities and therefore have fewer decisions upon municipal questions than some of the younger and smaller States with greater *centres* of population. Hence, authorities from other jurisdictions on these questions, as well as those relating to general mercantile and corporation law, are of great interest and value. However, upon other principles of older origin which have long received the earnest attention of the able jurists who have preceded us, and by repeated adjudications, directly or inferentially, have become embodied in the spirit of our laws and the genius of our people, we feel compelled to follow our own decisions, except for the gravest reasons. The rapid development of our civilization, with the changes wrought by the increasing and concentrating wealth of the age, and the wonderful discoveries in the arts and sciences, may force upon our attention new principles, or more often the new application of old principles. But, even in such cases, we should endeavor to meet existing conditions rather by an expansion or modification of the settled policy of our decisions than by any hasty reversal or total change. Moreover, the decisions of other States are frequently so far affected by local statutes as to be of little value to us.

We think his Honor erred in commanding the Board of Aldermen to appoint an arbitrator in view of the defendant's plea in bar. If the plaintiff is not entitled to recover at all, and we so hold, what is the use of an arbitrator? We think this comes under the rule of reference under *The*

Code, in which it has been repeatedly held that where there is a plea in bar, no reference should be ordered until the plea is finally determined. *Railroad* v. *Morrison*, 82 N. C., 141; *Neal* v. *Becknall*, 85 N. C., 299; *Leak* v. *Covington*, 95 N. C., 193; *Clement* v. *Rogers*, Ibid 250; *Grant* v. *Hughes*, 96 N. C., on p. 191; *Royster* v. *Wright*, 118 N. C., on p. 155.

In one respect this is a case to us of first impression. The plaintiff holds the fee in the naked street without a foot of abutting property. So far from there being any allegation of injury to the abutting owners (a question which we are not now considering) it appears that the action of the city, of which the plaintiff complains, was taken for their benefit and at their request. The judgment of the Court below is reversed.

Reversed.

J. L. WORTH v. G. SIMMONS.

Action to Recover Land—Tax Deed—Color of Title—Possession Under Color of Title—Constructive Possession—Evidence—Possession of Grantee No Evidence of Grantor's Possession of Land not Included in the Deed.

1. A description of land in a petition for partition as follows: "Thirty three or four thousand acres of land situate in the county of Surry, between Rockford and the Blue Ride," is too vague and indefinite to be aided by parol evidence.

2 Prior to the Revenue and Machinery Acts of 1887, a Sheriff's deed under a sale for taxes was (without other evidence) only color of title and not effective, unless aided by open, notorious and continuous possession for the statutory period.

3. While the possession of a tenant of a parcel of land within a general boundary of land belonging to his lessor, is in law, the possession of the lessor up to the boundaries contained in the latter's deed, it is different as to the possession of a purchaser of such parcel, since the vendee, while deriving title from his vendor, does not hold possession

under him, and his possession extends no further than the boundaries included in his own deed.

4. Where, in the trial of an action for the recovery of a parcel of land admitted to be within a boundary described in a tax deed executed before 1887, there was no actual possession under such tax deed shown by the plaintiff, or those under whom he claimed, deeds executed by the grantee in such tax deed and by his heirs and by a Commissioner in partition proceedings, after the death of such grantor, for certain parcels of land admittedly within the boundary of the tax deed, were inadmissible, as well as the possession of the purchasers under such deeds, to show the possession of plaintiff, or of those under whom he claimed, of any part of the tax deed boundary outside of the lands included in the deeds so offered.

CIVIL ACTION, tried before *Norwood, J.*, and a jury at Spring Term, 1896, of SURRY Superior Court. At the close of the testimony (which is summarized in the opinion of the Court) his Honor intimated that the plaintiff could not recover and thereupon the plaintiff submitted to non-suit and appealed.

Messrs. Glenn & Manly and *A. E. Holton*, for plaintiff (appellant).

Messrs. Watson, Buxton & Watson, for defendant.

FURCHES, J.: In 1795 and 1796 one Gotlieb Shober took out grants from the State covering over 40,000 acres of land lying in Surry County. Soon thereafter he sold and conveyed this land to Timothy Pickering. In the year 1813, one Wright sold the same for taxes and one James McCraw became the purchaser, and Wright, as Sheriff, made him a deed therefor. Between 1813 and 1836, McCraw sold and conveyed many small tracts contained within the boundary of the deed from Wright, Sheriff, to him. The said McCraw died intestate in 1836 leaving him surviving William McCraw, Nancy Boyer, wife of Stephen Boyer, Edmund W. McCraw, Elizabeth Collett, wife of David Collett, of lawful age, and Paulina, Sarah and Jacob McCraw, minors, his children and only heirs-at-law. In March, 1837, these heirs filed an *ex parte* petition in the Court of Equity of Surry County, to sell the lands of their father, James McCraw. In said petition they say "that they are seized and possessed as tenants in common of about thirty-three or four thousand acres of land situate in the County of Surry, between Rockford and the Blue Ridge; that said lands are very poor and broken, without any settlements upon them; that very little of said lands are, in the opinion of the petitioners, fit for cultivation; that it is true there is here and there a small piece susceptible of improvement."

Under this petition the Clerk and Master was appointed a Commissioner with power to sell the land, publicly or privately, under which power he made many sales of small tracts, which he reported to Court and they were confirmed.

This suit was transferred to the Superior Court docket and remained there until 1889, during which time various sales and orders were made thereunder. In 1889 the plaintiff, John L. Worth, as Commissioner, sold the residue of said land and David W. Worth became the purchaser, and the plaintiff has since become the owner of whatever estate the said David W. acquired by said sale. It was shown that the boundary contained in the deed from Wright, Sheriff, to James McCraw covered the land in controversy.

The Court admitted in evidence the grants to Shober, the deed from Shober to Pickering, the deed from Wright, Sheriff, to James McCraw, the deeds made by James McCraw to small tracts claimed to be a part of the land described in the deed of Wright, Sheriff, the petition and proceedings to sell the land for partition filed in March, 1837, and referred to above. The plaintiff then offered in evidence sundry deeds made by the Clerk and Master between 1837 and 1892, under this petition,—objected to by defendant and excluded.

They were then offered for the purpose of showing possession under the Sheriff's deed, and allowed for that purpose.

The plaintiff then proposed to show by parol evidence that the lands intended to be described in the bill of March, 1837, is the same land as that described in the deed of Wright, Sheriff;—objected to and excluded. The plaintiff then introduced the amendment, made to the original bill in 1892; he then offered the deed from him as Commissioner to David W. Worth and the *mesne* conveyances from David W. to the plaintiff. He also offered deeds from a part of the heirs-at-law of James McCraw to plaintiff.

Here, the plaintiff rested, and upon an intimation from the Court that he had not made a case, submitted to a judgment of non-suit and appealed.

In actions of ejectment the plaintiff must recover upon the the strength of his own title. There are exceptions to this general rule, but this case does not fall within these exceptions.

The defendant contends that there are two fatal defects in the plaintiff's title; that the deed from Wright, Sheriff, to James McCraw is only a color of title, and that there has been no possession shown to ripen it into a perfect title; and that the description in the original bill, filed March, 1837, is so fatally defective as not to support any sale made thereunder.

There are but two exceptions to evidence—one to the exclusion of deeds made by the Clerk and Master, not to the land in controversy, but to other small tracts contained in the boundary of the Sheriff's deed. But they were offered again for the purpose of showing, or tending to show, possession of the land in dispute, and were admitted. So, it would seem that if there was anything in this exception, it was cured. And the other exception is that the plaintiff "offered parol evidence for the purpose of identifying the land mentioned in the original bill." We do not see any error in this ruling as there is no description at all in the bill, to be aided by parol. But if there had been error in this ruling, it would have been harmless, as the plaintiff's title was defective, and his action must have failed on other grounds.

At the time of the sale by Wright in 1813, the Sheriff being the statutory agent of the State, his acts are strictly construed. And it devolved upon the purchaser at a tax sale to show that the law had been complied with in making the sale. *Avery* v. *Rose*, 15 N. C., 549, and cases cited under this case in Womack's Digest; *Hays* v. *Hunt*, 85 N. C., 303. This continued to be the law, with very little modification, until 1887, when the Legislature changed the rule of presumptions. And now it is about as hard to defeat a tax title, as it was before to establish one. Under the law as it stood at that time, the deed from Wright, Sheriff, to James McCraw, without other evidence was no more than color, which might be ripened into a title by open, notorious and continuous possession for seven years.

James McCraw during his life sold off and conveyed many small tracts included within the boundary of the Sheriff's deed, and the Clerk and Master also sold and conveyed many small tracts under the proceedings upon the bill filed in 1837, and this, the plaintiff claims, is evidence tending to prove possession. But this is not so. Possession means, some one on the land, exercising the rights of dominion and ownership over the same—some one who is liable to be sued in ejectment by the owner. If McCraw had leased this land to a tenant, though he only occupied an acre, his possession in law would have extended to the boundaries contained in the deed. And the only ground for claiming that the purchaser's possession is that of the grantor is that the purchaser claims his title under the grantor. But this will not do for two reasons: First, that while he derives his title from the grantor, he does not hold possession under the grantor, nor does he owe any duty to the grantor, but holds possession in his own right; and second, for the reason that his possession is restricted to the boundaries contained in his own deed. It must therefore follow that these deeds, and the possession of the purchasers holding under their deeds, afford no evidence of possession of land not included in their deeds. Although Wright's deed was made in 1813, it is no better or more effective now than it was when it was made, as it has not been aided by possession. *Huneycutt* v. *Brooks*, 116 N. C., 788.

But the facts in *Ruffin* v. *Overby*, 105 N. C., 78, are so nearly identical with the facts in this case, that we feel we have taken more time in discussing this case than we should have done. *Ruffin* v. *Overby* is decisive of this case.

There is no error and the judgment of the Court below is affirmed.

Affirmed.

MELISSA HOWELL v. BOARD OF COMMISSIONERS OF YANCEY COUNTY.

Action for Damages—Death caused by Wrongful Act—Widow of Deceased Not Entitled to Sue.

A widow has no right of action against persons wrongfully causing the death of her husband, the Statute (*The Code,* Section 1498) giving a right of action alone to the personal representative of the person killed.

This was a civil action brought by the plaintiff, the widow of Zeb Howell, in her individual capacity, and not as the personal representative of her deceased husband, against the Board of Commissioners of Yancey County, to recover damages for the death of her husband, occasioned by the alleged negligence of the defendants in permitting the county jail to become unclean and unhealthy, thus causing the death of her husband, and heard before *Norwood*, *J.*, at Fall Term, 1896, of YANCEY Superior Court, on complaint and demurrer. The demurrer was overruled and defendants appealed.

Messrs. J. S. Adams and *Huggins & Watson*, for plaintiff.
Messrs. McElroy & Moore, for defendants (appellants).

FAIRCLOTH, C. J.: Plaintiff alleges that she is the widow of Z. B. Howell, deceased, who, she alleges, died by reason of defendants' negligence in allowing the County jail to be and remain in an unhealthy condition during her husband's confinement therein. Plaintiff does not sue as the executrix, administratrix or collector of her husband, but sues in her own right, as the widow of deceased, and defendants demur on that ground. At common law the injured party alone could maintain an action for damages, and in case of death from the injury, the right of action did not survive to any one. By Statute (*Code*, 1498) the personal representative of the deceased is allowed to prosecute an action for damages at any time within one year from the death. The demurrer should have been sustained. *Code* 1498; *Best* v. *Kinston*, 106 N. C., 205.

We are not informed as to the truth of the allegations, nor is it necessary that we should be in order to dispose of this case; but, if they are true, the conditions would probably be improved by invoking the aid of the criminal side of the docket.

Judgment reversed.

C. F. OSBORNE v. CATAWBA FURNITURE COMPANY.

Practice—Appeal from Justice's Court—Notice of Appeal.

Where a Justice of the Peace delayed rendering judgment until after the trial and the defendant (the party cast) hearing of the judgment served a written notice of appeal on the plaintiff and the Justice, on demand of defendant and the payment of his fees, made up the case and sent the same to the Superior Court where it was docketed, it was error in the Judge below to dismiss the appeal, on motion of the plaintiff, upon the ground that no formal notice of the appeal was served upon the Justice of the Peace and that no notice of appeal was given at the trial.

This was a case on appeal from a Justice of the Peace, and heard before *Greene, J.*, at Fall Term, 1897, of McDOWELL Superior Court.

The plaintiff moved the Court to dismiss the appeal, for the reason that there was no notice of appeal served on the Justice of the Peace, no notice having been given in open Court before the Justice. The appearance of the plaintiff was a special one for the purpose of making the motion to dismiss the appeal.

It appearing to the Court from the records that there was no notice of appeal served on the Justice of the Peace, and no notice given in open Court before the Justice of the Peace, the Court allowed the motion and dismissed the appeal.

Mr. E. J. Justice, for plaintiff.
Mr. P. J. Sinclair, for defendant (appellant).

FURCHES, J.: This appeal does not present the merits of the controversy between the parties. The plaintiff brought an action against the defendant before a Justice of the Peace. The parties appeared at the time and place named in the summons and proceeded to trial. The Justice, not being ready at the hearing to render his judgment, held the same under advisement. This he had a right to do. *Reeves* v. *Davis*, 80 N. C., 209. But when he rendered his judgment he should have notified the parties. *Reeves* v. *Davis, supra.* This he did not do. But, as is shown, the defendant against whom the judgment was rendered, lost nothing by this neglect of the Justice of the Peace who tried the case. The judgment not being rendered at the trial, no appeal was taken then. But the defendant, finding out that judgment had been entered against it, caused a written notice of appeal to be served on the plaintiff's attorney within less than ten days from the date of the judgment, which it filed with the Justice, and which is returned with the papers to the Superior Court.

The defendant also paid the Justice 30 cents, his fee, for making out the transcript on appeal to the Superior Court; whereupon, the Justice made out the case on appeal and sent it to the Superior Court. But when Court came on to be held for McDowell County, in which the appeal was docketed, the plaintiff enters a "special appearance" and moves to dismiss the appeal because the defendant had served no written notice of appeal upon the Justice who tried the case.

Upon this state of facts, the Judge allowed the plaintiff's motion and dismissed the appeal. In this ruling there is error. The plaintiff had notice of the defendant's appeal, so he had no ground to complain. The Justice had notice, though not in writing, as the notice served on the plaintiff was filed with him, and the defendant had been to him, demanded an appeal and paid him his fee for making up and forwarding the transcript on appeal to the Superior Court. The magistrate by this waived any further or more formal notice, and in fact made up and sent the appeal to the Superior Court. Then what difference did it make to the plaintiff, whether the Justice had a written notice of defendant's appeal or not?

The notices of appeals are no part of the case on appeal. The notice to the Justice is only for the purpose of getting the case into the Superior Court, and the purpose of this notice was served when the appeal got there. The notice to the appellee is only for the purpose of informing him that the appeal has been taken so that he may prepare for trial. This the plaintiff had, within the time prescribed by the Statute. What has he to complain of? All the statutory provisions with regard to appeals should be observed, so that the law may be properly administered. But such technical constructions as are contained in this ruling of the Court below would tend to defeat rather than promote the ends of justice.

The judgment of the Court below is reversed, and the defendant's appeal must be restored to the docket of the Superior Court for trial.

Error.

R. K. PRESNELL v. J. W. GARRISON.

Action for Specific Performance—Boundaries—Parol Evidence—Competency—Improper Objection—Exclusion of Improper Evidence by the Court—New Motion.

1. On the trial of an action for specific performance of a contract for the purchase of land, the defendant defended on the ground that, as to a part of the land, plaintiff had no title, and plaintiff testified that he and the owner of the adjoining tract (since deceased) had agreed on the dividing line and according to such agreement he, the plaintiff, was the owner of the whole boundary sold to defendant. No party represented the deceased or claimed title under him. The defendant objected to the testimony on the ground that it was incompetent under Section 590 of *The Code*. *Held*, that, while the testimony was incompetent the objection that it was so under Section 590 of *The Code* was untenable, the true reasons for its incompetency being (1) that it was *res inter alios acta* and (2) that plaintiff could not be allowed to prove a title to the land by parol evidence.

2. While it is the general rule that, when a bad ground has been assigned for an objection to testimony offered below, a good ground cannot be assigned on the hearing of the appeal, yet it is subject to the exception that, where testimony is offered to prove a fact which it is unlawful to prove by parol, it is the duty of the Court to exclude it without objection.

CIVIL ACTION tried before *Robinson, J.*, and a jury at June, 1897, (Special) Term of BURKE Superior Court. The facts appear in the opinion. There was judgment for the plaintiff and defendant appealed.

Mr. S. J. Ervin, for plaintiff.
Mr. A. C. Avery, for defendant (appellant).

FURCHES, J.: The defendant purchased a tract of land containing about forty-five acres, from the plaintiff at the price of $3140, paid a part of the purchase money, gave his notes for the balance and took from plaintiff a bond for title, when the purchase money should be paid. The plaintiff brings this action for the balance of the unpaid purchase money, for a specific performance of the contract, and a sale of the land to satisfy the balance of the debt due.

The defendant answers and admits the contract of purchase, the bond for title when the purchase money is paid, and the execution of the note sued on. But he further alleges that the plaintiff has no title to about fifteen acres of said land so purchased, and cannot convey the title to this as he contracted to do, and asks that he be not compelled to take this defective title and be made to pay for the same.

To meet this defence the plaintiff went on the witness stand and testified that he and one George Deal, the grantor of one John Deal, and who is now dead, agreed on a dividing line between plaintiff and said George; and, according to that agreed line, he was the owner of the whole boundary sold to defendant. This evidence was objected to by the defendant, as being incompetent under Section 590 of *The Code*.

The Court overruled the defendant's objection, allowed the evidence and defendant excepted.

This exception cannot be sustained under Section 590 of *The Code.* There was no one representing the estate of George Deal, as a party to the action, nor was there any one claiming title under him a party. *Bunn* v. *Todd*, 107 N. C., 266; *Mull* v. *Martin*, 85 N. C., 406. It was incompetent as being *res inter alios acta.* It was also incompetent for the reason that plaintiff could not prove title to land by a parol contract. But plaintiff contends that as defendant assigned a bad ground for his objection below, he cannot assign a good ground in this Court, and this seems to be the general rule with regard to such objections to evidence. *Gidney* v. *Moore*, 86 N. C., 484; *Kidder* v. *McIlhenny*, 81 N. C., 123. But to this general rule there are some exceptions, among which is this: That when the law makes the evidence offered improper to prove the fact for which it is offered—that is, to prove a fact that cannot be proved by such evidence—it becomes the duty of the Court to exclude it, without objection. *State* v. *Ballard*, 79 N. C., 627.

If it be true that the plaintiff and George Deal, agreed that the line between them ran where the plaintiff testified that they agreed that it should, this agreement did not change the line made by their deeds. This agreement did not give the plaintiff title to more land than was conveyed to him by his deed, nor did it take any land from George Deal that belonged to him. The law does not allow the title to land to pass by parol contract. *Buckner* v. *Anderson*, 111 N. C., 572.

This evidence being offered to prove a fact that it was unlawful to prove by parol, should not have been allowed, although the objection was put on improper grounds. *State* v. *Ballard*, 79 N. C., 627. The furthest the Court have gone, so far as we have been able to see, is to allow such agreements in evidence, as tending to locate the true line contained in a deed.

But we do not understand from this record that this testimony was offered for that purpose, but for the purpose of estopping George Deal, and those claiming under him, from claiming title to this fifteen acres. The defendant is not compelled to take a defective title and he should not be compelled to pay for this land until the question of title is settled.

New trial.

T. J. GILLAM v. LIFE INSURANCE COMPANY OF VIRGINIA.

Action for Money Paid Through Mistake—Courts—Jurisdiction —Pleading—Referee—Amendment—Practice.

1. Under the *Code*, the demand for relief in a complaint is immaterial and the Court will give any judgment justified by the pleadings and proof.
2. The Superior Court has not original jurisdiction of an action by a stockholder in an Insurance Company doing business as a building and loan association against the company, to recover an overpayment of interest on a loan when the amount sought to be recovered is less than $200.00.
3. In an action to recover for overpayment of interest, made by mistake, recovery cannot be had for the forfeiture of double the interest as a penalty for usury, since, upon the allegation of such overpayment, by mistake, no legal implication arises that the plaintiff is suing for the forfeiture.
4. An amendment to a complaint, the effect of which is to confer and not merely to *show* jurisdiction, will not be permitted; hence, where the amount sought to be recovered in an action brought in the Superior Court was not within its jurisdiction, the plaintiff cannot be allowed to amend his complaint by changing the cause of action and increasing the amount of the recovery prayed for so as to bring it within such jurisdiction.
5. When to amend a complaint in an action would have the effect of depriving the defendant of the benefit of the plea of the Statute of Limitations, which could be used against an original action, the amendment will not be allowed.

CIVIL ACTION begun on the 2nd day of March, 1895, and heard, on exceptions to report of referee, at Fall Term, 1897, of BURKE Superior Court before *Greene, J.*

The action was to recover the sum of $132.37, the excess of interest alleged by plaintiff to have been paid to defendant under mistake and in ignorance of his rights. The complaint was, in substance, that the plaintiff in 1891 became a stockholder in defendant company and on August 1st, 1891, borrowed of the defendant $800.00, for which he gave his bond; that on the 13th day of November, 1894, he paid and discharged said bond by remitting to the defendant at its home office in Richmond, Virginia, the amount claimed by defendant as then due on said bond, *to-wit:* the sum of five hundred and fifty-eight dollars and twenty-two cents ($558.22), "which amount, as plaintiff is since informed and believes, is largely in excess of the true amount then due and owing the defendant, the excess being one hundred and thirty-two dollars and thirty-seven cents ($132.37) over the amount borrowed with interest at 6 per cent. per annum;" and that said excess was paid by the mistake and ignorance of the plaintiff as to his rights under the law, and not covinously or knowingly.

The complaint further states:

"That plaintiff is advised and believes, and so avers, that the retention of the said excess by defendant after its demand by plaintiff, which demand plaintiff made upon defendant before instituting this action and immediately upon ascertaining a knowledge of his rights under the law, was against conscience, illegal and usurious.

"Wherefore, plaintiff prays judgment against the defendant corporation.

"1. For the sum of $132.37 with interest from November 13th till paid, &c., and for such other equitable relief as the Court may see fit to grant."

After answer was filed, the cause was referred to S. T. Pearson, Esq., to state an account of the matters in controversy and at the hearing before the referee the plaintiff's counsel moved to amend the complaint by inserting $296.22 in place of $132.37 as the amount of excess of interest paid and to add to the appropriate paragraph the following: "That the said sum $296.22 so charged in excess of the legal rate of interest was knowingly and usuriously charged by defendant and plaintiff asks to recover double the said amount as penalty, *to-wit:* $592.44; and, also, to amend the prayer of the complaint by inserting "$592.44" instead of "$132.37."

The defendant moved to dismiss the action upon the ground that the Superior Court had no jurisdiction, the amount sued for being less than $200 and that the complaint did not state facts sufficient to constitute a cause of action.

The Referee in his report stated :

"The Referee is of opinion that the motion of the defendant is well taken and should be allowed, and that the Superior Court has no jurisdiction, but in as much as the motion was made in the Superior Court before the order of reference was made, and was not passed upon, I have concluded to allow the motion to dismiss, and to refuse the plaintiff's motion to amend on the ground that I have no power to grant either of the amendments which would confer jurisdiction upon the Superior Court, but proceed to hear the testimony and make a full report, so that if I am in error as to the jurisdiction, the Court will have the facts before it to proceed to judgment without another reference."

The Referee then reported his findings of facts one of which was that the excess paid by plaintiff over the amount borrowed with interest at 6 per cent. was $191.49, and another was that on the 14th day of November, 1894, with a full knowledge of the facts as appears from his letter of

November 13th, the plaintiff acknowledged satisfaction of, and released all of his rights under the endowment policy on which the loan had been made, and surrendered the same for cancellation.

On hearing the exceptions his Honor overruled the finding of the Referee that the Superior Court had no jurisdiction of the action, sustained the refusal of the Referee to allow the amendments asked for by plaintiff, and rendered judgment for the plaintiff for $382.98 double the amount of the excess of the debt and 6 per cent. interest paid by plaintiff. From this judgment the defendant appealed.

Mr. S. J. Ervin, for plaintiff.
Messrs. Avery & Avery, for defendant (appellant).

Clark, J.: It is true that under *The Code* the demand for relief is immaterial and the Court will give any judgment justified by the pleadings and proof. *Knight* v. *Houghtalling,* 85 N. C., 17; *Stokes* v. *Taylor,* 104 N. C., 394; *Hood* v. *Sudderth,* 111 N. C., 215; *Sams* v. *Price,* 119 N. C., 572, *Adams* v. *Hayes,* 120 N. C., 383. But upon inspection of the complaint this action is brought to recover an overpayment of $132.27 of interest, alleged to have been made by mistake and ignorance. The Referee correctly held that there was no original jurisdiction of such action in the Superior Court. *Holden* v. *Warren,* 118 N. C., 326. The plaintiff then sought to treat it as an action to recover the penalty for usury of forfeiture of double the interest paid. *Code,* Section 3836, (now amended by Act of 1895, Chapter 69). But upon an allegation of overpayment of interest by mistake, no legal implication arises that the plaintiff is suing for the forfeiture of double the interest, and there is nothing in the complaint from which it can be inferred. The amount of interest paid is not even stated, only the amount of the overpayment which it is claimed was paid by mistake.

In not sustaining the Referee and dismissing the action, there was error.

The Referee properly refused leave to amend (*Code*, §422) so as to charge a cause of action for the penalty of double the interest. This being an entirely different cause of action and for a different amount which was within the jurisdiction of the Superior Court, such amendment would have been "not to show but to confer jurisdiction" and therefore not allowable even under the present liberal system as to amendments. *Clendenin* v. *Turner*, 96 N. C., 416; *King* v. *Dudley*, 113 N. C., 167. Besides, to have allowed it might have had the effect to deprive the defendant of the benefit of the defence of the Statute of Limitations which could have been used against a new action brought for the avowed purpose of recovering the penalty for usury (*Roberts* v. *Insurance Company*, 118 N. C., 429) and for that reason also the amendment could not be allowed. *Gill* v. *Young*, 88 N. C., 58; *Henderson* v. *Graham*, 84 N. C., 496; *Cogdell* v. *Exum*, 69 N. C., 464; *Christmas* v. *Mitchell*, 38 N. C., 535.

The Superior Court had no original jurisdiction of the cause of action stated in the complaint.

Action dismissed.

In Re ESTATE OF ISAAC BOWMAN, Deceased.

Administration on Decedent's Estate—Administrators, Appointment of—Power of Clerk.

Where letters of administration are issued to one person, who qualifies, the power of the Clerk, in that respect, and as to that Estate, are exhausted and the subsequent appointment of another person as administrator, before the first appointment is revoked, is void.

Appeal by W. H. Quick, administrator of Isaac Bowman, respondent, from a judgment of the Clerk of the Superior Court of Union County, ordering that the letters of administration to him, on the estate of Isaac Bowman be recalled, cancelled and revoked, heard before *Norwood, Judge*, in court-house in Monroe, on Saturday, 15th February, 1897.

His Honor sustained the ruling of the Clerk, and Quick appealed. The facts appear in the opinion.

Mr. E. Y. Webb, for plaintiff.

Messrs. Adams & Jerome, for defendant (appellant).

MONTGOMERY, J.: Isaac Bowman, a brakesman in the employment of the Raleigh & Augusta Railroad Company, was killed on the 28th of January, 1896, while in the discharge of his duties. On the 6th of March following F. H. Whitaker, the public administrator of Union County, was duly qualified by the Clerk, administrator of the decedent. The intestate left him surviving one adult brother, and another brother and a sister, who are infants under twenty-one years of age. The letters of administration were granted upon an application in due form, and upon production by the applicant of a paper writing purporting to be the renunciation of the mother and adult brother of the right to qualify as administratrix or administrator. The paper was in due form and witnessed by A. B. Horn, a deputy sheriff of the county. On the 27th of March, three weeks after the qualification of Whitaker, the respondent W. H. Quick, applied for letters of administration on the same estate, upon a paper purporting to be the written renunciation of the mother; and ten days thereafter letters of administration were issued to Quick. On the day of application for letters of administration by Quick, ten days before his bond was executed and filed and before he had been qualified as administrator, he states in his affidavit filed in this case, that the Clerk "did issue to affiant a subpœna against the Railroad Company, by which decedent was killed, together with subpœnas for witnesses in the case:" and before two weeks had passed he had made an alleged settlement with the railroad company as to the damages which might have been recovered by the administrator of the decedent, on the basis of three hundred and fifty dollars, retaining out of the same one hundred and seventy-five dollars for his services as attorney at law, had paid the balance to persons entitled to it, including the two infant children and had filed what he calls his final account. It is difficult to read these admitted facts and repress some criticism of the conduct of the Clerk and of the attorney at law, Mr. Quick: but we do refrain and pass at once to the question involved. Was the action of the Clerk in granting letters of administration to Quick void? We answer, Yes. Everything appears to be regular in the proceedings in which the petitioner Whitaker was appointed administrator. When he afterwards undertook to appoint Quick administrator, the Clerk had exhausted his power in the granting of the letters of administration to the petitioner Whitaker. He had no power to grant letters upon the estate to any other person under any conditions while the letters issued to Whitaker were unrevoked. *Hyman* v. *Gaskins*, 5th Iredell, 267. The law could not tolerate such a condition of things as would ensue if the Clerk could appoint subsequent administrators leaving the letters of former ones unrevoked: nor will it permit suits at law raising the issue of fact to be tried between two rival administrators as to which one of them is entitled to the office. If the first letters had been fraudulently procured, or if they have been issued to the wrong person, the remedy is at hand —a motion to remove—and then, upon that being done, to have qualified the person entitled to administer. That was the course which should have been pursued in this case. The next of kin in this matter have lost their day, and the public administrator, the petitioner, has qualified according to law. What course he intends to pursue is not for us to say, but it is to be presumed that, if the fact be as he affirms in his affidavit that the railroad authorities made the settlement with Quick, treating with him as the administrator, after they had had notice that the petitioner had qualified as administrator of the decedent estate, had entered upon his duties and had advertised for creditors according to law, he will take steps to look into that settlement as well as to the charge made by Quick for his services as attorney, at least so far as the infant children are concerned.

We need not discuss the particulars of the alleged irregularities and errors in the proceedings, either of his Honor or of the Clerk, for they are immaterial when considered in the view of the law which we have taken.

The judgment of his Honor affirming that of the Clerk declaring letters of administration issued to Quick to be void and to be revoked, is affirmed.

Affirmed.

STATE ex rel J. G. SHENNONHOUSE v. J. S. WITHERS AND THE BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY.

Action in Nature of Quo Warranto—Office of Cotton Weigher—Election at Joint Meeting of Two Separate Bodies—Majority Vote of Members Present—Leave of Attorney General to Relator to Sue—Demand on Occupant of Office for Possession of Office.

1. Where, before the trial of the action, a relator obtained the consent of the Attorney General to prosecute the same in his name, and properly indemnified the State against the cost and expense of the action, it is immaterial that such consent was not applied for and obtained before the issuance of the summons.

2. Where, by a Statute (Ch. 30, Private Acts of 1885) it was made the duty of the Mayor and Board of Aldermen of the City of Charlotte and the County Commissioners of Mecklenburg County, in joint session and presided over by the Mayor of the City, on the first Monday in September of each year, to elect a cotton weigher for said City, the fact that the meeting of the Mayor and Board of Aldermen on such day was not a regular meeting of the Board does not invalidate the action of such meeting, since it was the duty of the Mayor to convene the Board of Aldermen in special session on the day fixed by the Statute for such election.

3. The failure of one member of a Board of Aldermen, consisting of twelve members, to attend a meeting of the Board does not invalidate the action taken at such meeting by the other Aldermen.

4. It is not necessary that one who claims an office shall make a demand upon the occupant for its surrender before bringing his action to recover it, especially when the incumbent claims the right to the office and its emoluments.

5. Where the power of appointment to an office is conferred by Statute upon two or more bodies and no provision for a quorum is made, nor is it provided that they shall act separately, the rule is that all the members of all the bodies must meet together for consultation, or all must be *notified so to meet*, and thereupon, if the majority of those present constitute a majority of all the members of all the bodies, they may proceed to make the appointment

6. Chapter 30, Private Acts of 1885, provides that "the Mayor and Board of Aldermen of the City of Charlotte and the County Commissioners of the County of Mecklenburg, in joint session and presided over by the Mayor of the City, on the first Monday in September 1885 and every year thereafter, shall elect one Cotton-weigher for the City of Charlotte." The Act does not prescribe the quorum or whether a majority shall govern or place any check or limitation in favor of the members of either Board or of the component parts of either Board. The Mayor and eleven out of the twelve members of the Board of Aldermen convened on the first Monday of September 1897 in the City Hall (where the previous joint meetings had been held) and sent a communication and notice to the Board of County Commissioners (composed of three members and then in session at the Court House) to the effect that the Mayor and Board of Aldermen were then in session, in the City Hall, in pursuance of the Act of 1885, for the purpose of electing a cotton weigher and that, although the previous annual joint meetings for such purpose had been held in the City Hall, the Board of Aldermen would meet at any other place

the Board of Commissioners might prefer and indicate. The Board of Commissioners having declined to attend on the ground that one of the Aldermen was absent from the City and that there was no regular or called meeting of the Mayor and Board of Aldermen then in session, the Mayor and the eleven Aldermen proceeded to the election of a cotton weigher, whereupon S., having received seven of the eleven votes was declared elected: *Held*, in an action by S. to recover the office from W., the incumbent, and for a mandamus to compel the Board of Commissioners to induct him into office, that the election of the relator was valid notwithstanding the absence of the Board of Commissioners from the meeting.

CIVIL ACTION for the recovery of the office of cotton weigher for the City of Charlotte, brought by the relator against the defendants and tried before *Hoke, J.*, and a jury at Fall Term, 1897, of MECKLENBURG Superior Court on an agreed statement of facts (which are summarized in the opinion of Montgomery, J.) Upon the facts agreed, his Honor directed the jury to answer the issues "no," and gave judgment against the plaintiff who appealed.

Messrs. Jones & Tillet and *Osborne, Maxwell & Keerans*, for plaintiff (appellant).

Messrs. Burwell, Walker & Cansler and *Clarkson & Duls*, for defendants.

MONTGOMERY, J.: The first Section of Chapter 30 of the Private Laws of 1885, provides for the election of a cotton weigher for the City of Charlotte in the following language: "That the Mayor and Board of Aldermen of the City of Charlotte, and the County Commissioners for the County of Mecklenburg in joint session, and presided over by the Mayor of the City, on the first Monday in September, one thousand eight hundred and eighty four, and every year thereafter, shall elect one cotton weigher for the City of Charlotte . . ." At eleven o'clock a. m. on the 1st Monday in September of the present year eleven of the twelve members of the Board of Aldermen met with the Mayor in the City Hall, in the Hall of the Board of Aldermen, and the Mayor sent and had delivered to the Chairman of the Board of Commissioners, composed of three members, that Board being in regular session, a communication and notice to the effect that the Board of Aldermen were then in session, in the City Hall, in pursuance of the Statute of 1885 for the purpose of electing a cotton weigher for the City of Charlotte. It was further stated in the communication that the joint meetings of the two bodies for the election of a cotton weigher had heretofore been held in the City Hall, but that if the Board of Commissioners should prefer, the Board of Aldermen would meet with them at any place the Commissioners might indicate. The Commissioners in reply sent a verbal message to the Mayor and Aldermen declining to meet them, alleging as a reason for the declination "that one of the twelve Aldermen was absent from the City of Charlotte and that there was no regular or called meeting of the Mayor and Board of Aldermen then in session, and suggesting that the two Boards should have a joint meeting for the purpose of electing a cotton weigher on the 20th day of September at an hour and place to be designated and agreed upon." Upon receiving the message from the Board of County Commissioners, the Mayor and eleven Aldermen proceeded to the election of a cotton weigher, in which election seven of the Aldermen voted for the plaintiff and four of them for the defendant for that place, and the Mayor declared the plaintiff elected. The plaintiff at the proper time executed and tendered to the Board of Commissioners a bond in proper form and with sufficient sureties, which which was declined without examination or inspection, the members of the Board stating that they had been *advised* that the plaintiff had not been legally elected cotton weigher.

There was one of the Aldermen absent from the town at the time of the election. The plaintiff, before he brought this action, made no demand on the defendant, the present incumbent, for the place and had taken no oath of office, and at the commencement of the action did not have the consent of the Attorney General to bring the action but has since obtained from that officer a paper writing ratifying and approving the bringing of the action.

His Honor charged the jury that they should find the first issue, "Is the relator of plaintiff of right entitled to the office of cotton weigher in the City of Charlotte?" No; and the second issue, "Have the Board of Commissioners wrongfully refused to take bond of relator of plaintiff as cotton weigher and to induct him into his office?" No. The defendant's objection that the action was brought without the consent of the Attorney General is without force, since it appears that the consent of that officer was obtained before the trial of the action. The application to the Attorney General to bring such an action could *not have been refused*, and no harm has been done in this case, for the plaintiff has given satisfactory security to indemnify the State against all cost and expenses which may accrue in consequence of bringing the action. The plaintiff's action in this respect is analagous to that of a suitor who should procure a summons to be issued by the Clerk without giving the bond required by Section 209 of *The Code*, and who afterwards and before trial filed the bond required by the Statute. *Russell* v. *Saunders*, 48 N. C., 432; *McMillan* v. *Baker*, 92 N. C., 110.

The objection by the defendant that the day on which the Mayor and Board of Aldermen met was not a regular meeting of the Board, is of no consequence. The Act of 1885 made the first day of September the day for the election of cotton weighers of Charlotte, and it was the duty of the Mayor to convene the Board of Aldermen in special session for that purpose. That day, too, doubtless was named by the General Assembly for the convenience of the

Commissioners, it being their regular monthly meeting day.

Nor is there any more force in the objection that one member of a Board of Aldermen, out of twelve, was out of place. The law surely does not contemplate that the failure of one member of a Board consisting of twelve, to attend a business meeting would be fatal to its action.

Another objection on the part of the defendant was that the plaintiff made no demand upon the defendant for the office. No demand was necessary. In the language of the opinion in *Heath* v. *Morgan*, 117 N. C., 504, "the reason why a demand in any case is required is that the defendant may surrender the property without the trouble and cost of a suit, and when it appears as in this action that defendant still claims the right to hold the property, no demand is necessary."

The main question in the case is whether it was necessary to the validity of the plaintiff's election that the Board of Commissioners as an organized body should have participated in the meeting of the first of September, when the seven Aldermen cast their ballot for him. It was conceded by the counsel of the plaintiff in the argument here that under the law as it is in England the presence of the Board of Commissioners at some stage of the proceedings would have been necessary. But they contended that such ought not to be the rule here, on general principles, and that it has also been displaced by a statutory one. *Code*, Section 3765, sub Sec. 2. That section is in the following language: "All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

We have arrived at the conclusion that the English rule on this question should not prevail in North Carolina, as being inconsistent with the genius of our institutions. The

English adjudications are based on that people's idea of the nature and character of their municipal corporations, and was adopted by them in imitation of their form of government. It is well said in *Whitehead* v. *People*, 26 Wend. 643, that "The loyal subjects of the British Crown (in their view of corporations) discover a government within a government, and amuse themselves by drawing analogies between their constitution and that of their own boasted Empire. In the Mayor they think they see their sovereign, in the Aldermen the House of Lords, and in the commonalty the House of Commons, and they are pleased to think that, as a valid law requires the concurrence of the Crown and both Houses of Parliament, so these branches of the little Empire must all be present and act, or else their doings are void." But with us these corporations are created for practical business purposes and to carry out the intentions of our people—the intentions of a people who govern themselves in respect to that part of the government committed to their jurisdiction.

The Act of 1885 authorizing this election provides for a *joint* meeting of the Board of Aldermen and County Commissioners to be presided over by the Mayor. There is nothing in the statute which fixes the rule of a quorum, nor does it provide whether a majority should govern, nor is there a word placing any check or limitation in favor of the members of either Board or of the component parts of either Board. The contemplated meeting is one in which all the individuals of each Board are blended without order in one joint body, and nothing is dependent upon the concurrent action of each Board. The Board of Commissioners is not even authorized by the statute to participate in the organization of the meeting, for its presiding officer is fixed under the terms of the statute. The Board of Commissioners had a sufficient notice of the meeting sent to them by the Mayor, apprising them of the meeting provided for under the statute, and of the place where the meetings had been usually held for years. The notice contained the further statement that, if the usual place of meeting was not agreeable to the Commissioners, the Commissioners might indicate the place. The reasons assigned by the Commissioners for their refusal to comply with the law were no reasons. By their conduct they intended a deliberate refusal on their part to comply with the law—a law as clear as light, a law that admitted of no two constructions and which was enacted for the purpose of having carried out one of the fundamental ideas of our system of government, the right of the people to choose their own officers at stated periods and providing a means against perpetuities in office. Can it be seriously thought that our laws would permit this Board of Commissioners by its wilful refusal to attend this meeting, after having received proper notice, to thwart this act of legislation and thereby enable the present incumbent to hold over, thereby creating confusion in public affairs and shocking the common sense of justice of our people? If we were without precedent in this matter we would be compelled to take the view we have taken of this case for the reasons assigned. But we are not without precedent. In Throop on Public Officers, Section 116, the following doctrine is announced: "Where the power of appointment to an office is conferred by statute upon two or more bodies, and no provision for a quorum is made, nor is it provided that they shall act separately, the rule is that all the members of all the bodies must meet together for consultation, *or all must be notified so to meet*, and thereupon if the majority of those present constitute a majority of all the members of all the bodies, they may proceed to make the appointment." And in the case of *People* v. *Walker*, 24 Barb. 304, the statute in New York being in substance like the provisions in our Act of 1885 as to the manner of meeting of the Boards, the principal announced in Throop, *supra*, is affirmed.

There was error in the instructions of the Court to the jury, and but for the verdict of the jury we would reverse the judgment and give judgment for the plaintiff.

New trial.

T. H. GAITHER v. HASCALL-RICHARDS STEAM GENERATOR COMPANY.

Lease of Building—Warranty—Trial—Instructions—Verdict of Jury, Impeachment of.

1. The law, in leases, does not imply any warranty as to the quality or condition of the leased premises.
2. Where, in the trial of an action for the rental of buildings which the lessee had abandoned for the alleged reason that, on account of the rising of water in the basement, the condition of the premises endangered the health of defendant's agents and employees, and that plaintiff was aware of but concealed the defect from defendant's agent, who contracted the lease, the trial Judge instructed the Jury that, if they should not believe that the condition of the basement became a nuisance, they should find for the plaintiff; *Held*, that such instruction was not objectionable as including the submission of a question of law to the jury when it was preceded in the charge by the statement that, if the basement became wet and its condition injurious to the health of the occupants of the building, then it was, in law, a nuisance
3. Where a jury retired at 11 a. m., to consider of their verdict, which was returned at 3 p. m., such verdict cannot be impeached because the Sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the Judge should tell him to take them to dinner

CIVIL ACTION, tried before *Brown, J.*, and a jury at March Term, 1897, of MECKLENBURG Superior Court, on appeal from the Court of a Justice of the Peace. There was a verdict for the plaintiff and the defendant appealed from the judgment thereon for the reasons assigned in the opinion of the Court.

Mr. H. W. Harris, for appellant.

Messrs. Clarkson & Duls, for appellee.

FAIRCLOTH, C. J.: On July 1, 1896, the plaintiff let to the defendant the first floor and basement of a certain building at an agreed price for one year. The basement was then dry and in good condition. The defendant alleges that, in September and October next, water arose in the basement floor and its condition "became such as to injure and endanger the health of the defendant's agent and employees who worked on the floor above;" that plaintiff knew the basement had been a wet cellar but concealed this serious defect from the defendant's agent. The defendant abandoned the premises on October 31, 1896, and refused to pay rent any longer, for which this action is brought. Each party introduced evidence to show the condition of the cellar before, at and after the date of the lease, and the jury rendered a verdict in favor of the plaintiff. His Honor instructed the jury as follows:

"If the jury find from the evidence that the basement had, before the execution of the lease, been a wet cellar and the plaintiff knew this fact but fraudulently concealed it from defendant at the time of making the contract, and that the basement afterwards became wet and its condition injurious to the health of defendant and its agents—in other words a nuisance—and that defendant, through reasonable fears of injury to health, abandoned the premises on that account, then defendant would not be liable for rent, and the jury should answer the issue "No." But, if the jury should not find from the evidence that the basement had been a wet cellar before, or that plaintiff had knowledge of it and concealed it from the defendant, or, if they should not believe that the condition of the basement became a nuisance or that defendant left the premises through reasonable fears of injury to health, but on some other account, then they should answer the issue "Yes," and, in that event should find what amount is due." Defendant moved for a new trial on the grounds: 1. That the Court erred in using the word nuisance as set forth above in that portion of the charge which is made a part of the case. 2. That while the jury were considering the verdict the officer in charge of the jury, without any order from the Clerk, denied them any refreshments, except water, for a long time and, in answer to their requests for dinner, informed them a number of times that they would have to wait until they agreed on a verdict, whereby the jury were induced to consent to a verdict.

The first exception is that the Court submitted a question of law to the jury, when in the latter part of the charge he told them "or if you should not believe that the condition of the basement became a nuisance." This would seem so, but for the previous part of the charge where he told the jury that if the basement became wet and its condition injurious to the health of the defendant and its agents, then it was in law a nuisance. The condition of the basement was the fact for the jury to find, and when it was found by the jury the Judge announced the law accordingly. There was no express warranty as to the condition of the cellar and the law, in leases, does not imply any warranty as to the quality or condition of the leased premises. Taylor on Landlord and Tenant, Section 381.

The jury retired at 11 o'clock, a. m., and rendered their verdict at 3 p. m. In the meantime they were in charge of the Sheriff, who declined to give them refreshments, except water, and told them they must wait until they agreed on a verdict, or until the Judge told him to take them to dinner. This matter is regulated by *The Code*, Section 1736, and Chapter 44, Acts 1889; and we see nothing in the conduct of the Sheriff prejudicial to the defendant's rights.

Affirmed.

WEATHERS & CROWDER v. J S BORDERS and wife.

Mechanic's Lien—Married Woman—Charge on Separate Estate.

The separate estate of a married woman is not subject to a lien for labor done or materials furnished for its improvement under a verbal contract of herself and husband.

CIVIL ACTION, begun in the Court of a Justice of the Peace to enforce a mechanic's and laborer's lien and heard on appeal before *Norwood, J.*, at Spring Term, 1897, of CLEVELAND Superior Court. The facts are stated in the opinion of the Court. From the judgment dismissing the action as to the *feme* defendant the plaintiffs appealed.

Messrs. Webb & Webb for plaintiffs (appellants.)

No counsel *contra.*

FAIRCLOTH, C. J.: Defendant and her husband contracted with plaintiffs verbally, to have a house built on her land and materials furnished for the building. The house was built and paid for except $37.81. Defendants, alleging that bad work was done and inferior material used, refused to pay the balance. Plaintiffs sue for balance and ask to have their judgment declared a lien on the house and lot. This is the only question. Plaintiffs admitted the contract was not in writing and thereupon his Honor held that they could not recover on their own showing and adjudged that the *feme* defendant go without day and that plaintiffs have judgment against the husband for the balance. Plaintiffs appealed from that part of the judgment dismissing the action as to the *feme* defendant.

It has already been held that a wife cannot subject her land or separate interest therein, in any way, except by a regular conveyance executed as required by the Statute, and then the *intent* to charge her separate estate must appear on the face of the instrument creating the liability.

She may charge her personal estate by herself or by an agent, for her necessary personal expenses, or for the support of her family, or to pay her ante-nuptial debts, without the written assent of her husband, and may make him her agent to manage her separate estate. *Code*, Section 1826; *Thompson* v. *Taylor*, 110 N. C., 70; *Loan Association* v. *Black*, 119 N. C., 323; *Bazemore* v. *Mountain*, 121 N. C., at the present Term.

She cannot rătify a void contract. See second case cited *supra*. No error. Judgment affirmed.

Affirmed.

B. J. EDWARDS et al. v. W. W. PHIFER.

Trial—Evidence—Irrelevant Testimony—Harmless Error—Charge of Trial Judge—Verdict.

1. Although testimony, which does not prove, or tend to prove the contention of either party to an action, is irrelevant and should properly be excluded, yet its admission is harmless error.
2. The fact that, in the trial of an action, one party happens to get the benefit of the testimony not strictly competent, does not justify the admission of incompetent evidence for the benefit of the other party (*Cheek* v. *Watson*, 90 N. C., 302, disapproved).
3. When the substance of a party's prayer for instruction is given in the charge by the trial Judge, it is not necessary that the exact language of the prayer should be followed.
4 Where, in the trial of an action by the vendee of land against the vendor to recover the difference between $782, the contract price of the land, as plaintiff alleged, and the value of ten shares of stock in a Building and Loan Association which, as defendant alleged, the plaintiff subscribed for and assigned to him and agreed to keep up until maturity, and for which defendant received $1,000 at its maturity, the issues were : (1) "What was the purchase price of the property under the terms of the contract ?" and (2) "Is the defendant indebted to plaintiff? If so, in what amount?" ; and the jury responded to the first issue "Ten paid up shares in Building and

Loan, and plaintiff was only to be made to pay therefor $782;" and to the second issue the response was "Thirteen dollars and interest;" *Held*, that the verdict was an explicit finding that the contract price of the land was ten shares of stock as contended for by defendant, and plaintiff cannot complain of the inconsistent finding, in response to the second issue, in her favor.

CIVIL ACTION tried before *Hoke, J.*, and a jury, at Fall Term, 1897, of MECKLENBURG Superior Court. The facts appear in the opinion. The plaintiff objected to the findings of the jury as inconsistent and irresponsive and as not warranted by the pleadings and evidence, and appealed from the judgment thereon.

Messrs. Osborne, Maxwell & Keerans, for plaintiff (appellant.)
Messrs. Jones & Tillett and *Geo. E. Wilson*, for defendant.

FURCHES J.: The *feme* plaintiff bought a house and lot in the City of Charlotte from the defendant. The deed has been made and there is no dispute about the title. The only controversy is as to the price of the house and lot. The plaintiff claims that it was $782, while the defendant claims that it was ten shares of paid up Building and Loan Stock of the nominal value of $100 each, making in the aggregate $1,000. The plaintiff not having the ready money to buy the property, it was agreed that the price, whatever it may have been, was to be paid through the Building and Loan Association. For this purpose the plaintiff subscribed for ten shares which she afterwards assigned, on the books of the company, to the defendant. The plaintiff kept the weekly dues paid on these ten shares of stock, until it matured in 1896, and the defendant receipted for and drew the money due thereon, $1,000.

The plaintiff contends that only $782 of the money drawn by the defendant from the Building and Loan Association belonged to the defendant, and this action is brought to recover the difference between $782 and $1,000.

The plaintiff swore that the contract price was $782 and introduced other evidence tending to corroborate her; while the defendant swore that the contract price was ten paid up shares of stock of the nominal value of $100 each in the Building and Loan Association, and introduced other evidence tending to sustain him.

During the trial the plaintiff introduced evidence as to the value of the property—as to what the lot unimproved was worth, and also as to the cost of putting the house on it, said to be about $650. And defendant, over the objection of plaintiff, was allowed to prove by an officer of the Association that plaintiff, in fact, paid into the Association on this stock $795, and the balance, making the $1,000, was paid from the dividends due on said stock.

The plaintiff claims that the admission of this evidence was error, and that she has been prejudiced thereby; while the defendant claims that it was not error; and if it was error, it was justified by the incompetent evidence introduced by the plaintiff as to the value of the house and lot—in other words that "honors are easy," and cites *Cheek* v. *Watson*, 90 N. C., 302, to sustain this contention. It does not seem to us that *Cheek* v. *Watson* can be sustained by precedent or authority, and this ruling of the Court does not meet our approval. But it does not seem to us that the correctness of the judgment of the Court depends on this ruling of the Court.

This evidence was irrelevant, as it did not prove, nor tend to prove, any issue before the Court. It did not tend to prove the plaintiff's contention that the price of the property was $782, nor did it tend to prove the defendant's contention that the price was ten paid up shares of stock in the Building and Loan Association. In other words, it did not prove or tend to prove the contract, as contended by either party, and should have been excluded, *Short* v. *Yelverton*, at this term. As to whether it tended to disprove the plaintiff's contention that the contract price was $782 is not before us, as the defendant did not appeal. But as we fail to see how it could have tended to prove that the contract price was ten paid up shares of stock of $100 each in the Building and Loan Association, it was harmless error. In fact, the same thing had been proved by the defendant's testimony, just before, without objection on the part of the plaintiff.

The Court did not read several of the prayers of the plaintiff for instructions, while the Court remarked that they were good law, and the plaintiff excepted to this. This exception would be well taken but for the fact that the substance of the plaintiff's prayers are given in the charge of the Court, and it was not necessary that they should be in the language of the prayers. *Patterson* v. *McIver*, 90 N. C., 493; *Brink* v. *Black*, 77 N. C., 59; *State* v. *Hargrave*, 103 N. C., 328.

It is contended by the plaintiff that the verdict is irregular, uncertain, and not responsive to the contention of either plaintiff or defendant, and that the Court committed an error in allowing such a verdict to be rendered, and in going to judgment thereon. It is true that $795 is not in accordance with the contention of either party, nor does it seem to be sustained by the evidence. But this is not the verdict of the jury upon the issue submitted as to what was the contract. The issues submitted to the jury were as follows:

1. "What was the purchase price of the property under the terms of the contract? Ans., ten paid up shares in Building and Loan, and plaintiff was only to be made to pay therefor $782."

2. "Are the defendants indebted to the plaintiff, if so in what amount? Ans. $13.00 with interest from March, 1896."

So it is seen that the jury explicitly found that the contract price was ten paid up shares of stock in the Building and Loan Association—adding what was unnecessary and surplusage, for which she "was only to pay $782." If they had stopped with this issue, the plaintiff would have been entitled to nothing. It is the second issue that contains the erroneous finding of $13.00 in favor of the plaintiff. While the defendant would have had grounds to complain of this finding, we do not see how the plaintiff can complain, as it is in her favor.

It may be that the defendant got the advantage in the trade—got more for the property than it was worth. But if this be so, it is not a matter that we can remedy.

Affirmed.

W. R. SAMS v. PRICE, WELCH & CO.

Practice—Amended Complaint—New Cause of Action—Statute af Limitations.

Where plaintiff sued for the price of "sawed timber" and afterwards filed an amended complaint alleging that one M sold to defendants a "lot of logs" and that it was agreed between plaintiff and M and the defendants that plaintiff should be paid a certain sum from the sale of one half thereof; *Held*, that the cause of action was changed by such amended complaint and the defendants had a right to set up in their answer thereto any and all legal defences, including the Statute of Limitations, just as if the action had been commenced at the date of the amended complaint.

CIVIL ACTION tried before *Norwood, J.*, and a jury at Fall Term, 1897, of MADISON Superior Court. The facts appear in the opinion. There was a judgment for defendants, on the verdict, and plaintiff appealed.

Messrs. Gudger, Pritchard & Rollins, for plaintiff (appellant).

Mr. Geo. A. Shuford, for defendants.

MONTGOMERY, J.: In the original complaint the plaintiff's cause of action was based on a sale and delivery to the defendants of a lot of *sawed timber* at the agreed price of $401.54. After the testimony had been concluded the Judge allowed the plaintiff to amend his complaint. The amendment was an allegation that one McLean sold to the defendants a *lot of logs* and agreed with the defendants that out of the money which might arise from the sale of one half of the lumber to be cut from the logs they would pay to the plaintiff $401.54; that defendants and McLean and the plaintiff agreed to this arrangement, and that defendants received the lumber and have refused to pay to the plaintiff the $401.54. The defendants denied the allegation contained in the amended complaint and pleaded the Statute of Limitations to it. The following issues were submitted:

1. Are the defendants indebted to the plaintiff, if so how much?

2. Did the plaintiff's cause of action alleged in his amended complaint accrue more than three years before the filing of said amended complaint?

His Honor charged the jury that the plaintiff had offered no evidence which they could consider in their answer to the first issue upon the allegations made in the original complaint, and that if more than three years had elapsed next preceding the filing of the amended complaint they should find the second issue, yes. There was no error in the charge of his Honor.

We have examined the testimony offered in the case, and none of it was relevant to the allegations of the original complaint. The amended complaint was filed in August, 1897, and the testimony of the plaintiff was that the contract declared upon in the amended complaint was made in October, 1893. The cause of action set out in the amended complaint was entirely different from the one embraced in the original complaint. There was a change of subject matter of controversy and other parties were brought in. The defendants therefore, had the right in their answer to the amended complaint to set up any and all legal defences that were open to them just as if the action had been commenced at the date of the amended complaint. *Gill* v. *Young*, 88 N. C., 58; *Hester* v. *Mullen*, 107 N. C., 724.

The answer to the first issue was $375 and to the second, Yes, and judgment was rendered against the plaintiff.

Affirmed.

COMMISSIONERS OF STANLY COUNTY v. I. W. SNUGGS, Treasurer.

Invalid Statute—Constitutionality of Statute Authorizing Creation of Debt and Levy of Taxes—Mandatory Requirements of Constitution as to Passage of Statutes—Journals as Evidence —Power of County to Issue Bonds under The Code, Section 1996, in Aid of Railroad Not Begun at Date of The Constitution—Purchasers of Municipal Bonds, Duty of.

1. Section 14, Article 2, of the Constitution providing that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings which readings shall have been on three different days, and agreed to by each House respectively, and unless the *yeas and nays* on the second and third readings of the bill shall have been entered on the "Journal" is mandatory.

2 In the trial of an action to declare invalid bonds of a County issued in pursuance of the authority of an act of the General Assembly, it is competent to introduce in evidence the Journal of the House or Senate to show that such Act was not passed in conformity with the requirements of the Constitution, and when such Journal shows

affirmatively that the act authorizing the creation of the indebtedness, or the imposition of a tax, was not passed with the formalities required by Section 14, Article 2, of the Constitution, such Journal is conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act, and such act is invalid so far as it attempts to confer the power of creating a debt or levying a tax. (*Bank* v. *Commissioners*, 119 N. C., 214, followed and *Carr* v *Coke*, 116 N C., 223, distinguished.)

3. A County has no power, under Section 1996 *et. seq.* of *The Code* and an affirmative vote of the qualified voters of the County, to issue bonds and levy a tax for their payment in aid of a railroad not begun before the adoption of the Constitution of 1868.
4. It is incumbent upon the purchasers of State, County and municipal bonds to ascertain whether the authority to issue them has been granted according to the requirements of the Constitution

FAIRCLOTH, C. J., dissents, *arguendo.*

CIVIL ACTION commenced in the Superior Court of STANLY County to enjoin the payment of the interest on certain bonds issued by Stanly County in aid of the Yadkin Railroad Company and heard on the return of the motion to show cause, &c., before *Coble, J.*, at Chambers. From an order continuing the injunction to the hearing the defendant appealed.

Messrs. A. C. Avery, D. Schenck, Jr., and *Shepard & Busbee*, for plaintiffs.

Messrs. Long & Long and *Battle & Mordecai*, for defendant (appellant).

MONTGOMERY, J.: On the 15th of August, 1889, at an election held in Stanly County, a majority of the voters of the County cast their ballots in favor of subscription to the capital stock of The Yadkin Railroad Company to the amount of One Hundred Thousand Dollars. Bonds of the County to that amount were issued in payment of the subscription and delivered to the President of the Company. The annual interest has been paid regularly except that accruing on the first of July, 1897, which has been collected and is now in the hands of the defendant, who is the treasurer of the County, and who is about to pay it to the holders of the coupons. The plaintiffs, tax payers of the County and the Board of Commissioners, bring this action alleging that the Acts of 1870-'71, Chapter 236, and the Acts of 1887, Chapter 183, under which the commissioners attempted to act and under which the election was held, were void for the reason that they were not passed as required by Section 14 of Article II of the Constitution, and that the bonds were therefore illegally issued, and they pray that the Treasurer of the County, the defendant, be perpetually enjoined from paying the sum now in his hands or any other sums which may hereafter come into his hands to the holders of the coupons. The matter was heard before *Coble, Judge*, and the restraining order theretofore granted was continued and the defendant enjoined from paying out the money in his hands until the final hearing of the case.

The act of incorporation of the Yadkin Railroad Company, Chapter 236 of the Laws enacted by the General Assembly of North Carolina at its session of 1870-'71, in its fourth section, made provision for subscription to be made to the capital stock of the company by any County along the line of the road to such amount as a majority of the County Commissioners might determine, subject to the approval of the qualified voters of the County, the Commissioners, in order to pay the subscriptions, being empowered to issue bonds for that purpose and to levy taxes to pay the bonds and interest upon them. Section 4 of the Act of Incorporation was amended by Chapter 183 of the Laws of 1887, the amendment extending the privilege of subscribing for stock of the company to the towns and cities and townships along the line of the road and requiring the subscriptions to be approved by a majority of the qualified voters of such cities, towns and townships, and providing further that bonds should be issued in payment of said subscription and taxes levied to pay the same, principal and interest, according to the terms and conditions of said bonds, and that the board of commissioners of the County should issue the bonds and levy the taxes to pay the township subscriptions. Section 14 of Article II of the Constitution ordains that "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the Counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays, on the second and third reading of the bill shall have been entered on the Journal."

The plaintiffs were allowed to produce copies of the House Journal certified to by the Secretary of State, to show that the above mentioned Acts were not passed by the General Assembly in accordance with the requirements of the Constitution. That Journal showed that the bill which became Chapter 236 of the Laws of 1870–'71 was introduced on the 31st of March, 1871, and referred to the committee on internal Improvements; that it was reported favorably on the next day, and that on the 3rd of April, two days after its introduction, it passed its second and third readings, and that there was no entry of the yeas and nays on either of its readings. From that Journal it appears that the bill which was enacted into Chapter 183 of the Laws of 1887 passed its second reading on February 26 and that the yeas and nays were called on that reading and entered on the Journal; that the bill passed its third reading on the 28th of February but the yeas and nays were not entered on the journal on that reading.

We are of the opinion that it was competent to introduce the House Journal as proof that the Acts referred to were not passed according to the requirements of the Constitution, and they established that fact. That provision of the Constitution (Section 14 of Article II) is mandatory, as we have decided in *Bank* v. *Commissioners*, 119 N. C., 214. It is the protection which the people, in convention, have thrown around themselves for the benefit of the minority as well as of the majority. The object of the provision was to prevent hasty and ill-advised legislation by means of which the people might be deprived of their property not for the ordinary expenses of government but, by special taxation, for enterprises ostensibly in the name of the public good, but which might prove sources of individual injustice and injury. When indebtedness of the kind mentioned in the provision is sought to be incurred, the people have said in that provision that their legislative body, whenever considering the propriety of authorizing it, shall be not only careful but *deliberate;* that the bill shall be read three several times and pass three several readings, and that no two readings of the bill shall be had on the same day, and that the names of the legislators who vote on the question shall be known to the people in the enrollment of their names on the Journal. It is a reasonable requirement, too, and especially serviceable to those who are property holders and tax-payers, and the information is easy to be had by all who may be interested, for Section 16 of the same Article of the Constitution ordains that each House shall keep a Journal of its proceedings which shall be printed and made public immediately after the adjournment of the General Assembly.

Therefore, it is clear that in legislation in reference to raising money on the credit of the State or pledging its faith to the payment of debt, or imposing any tax on the people of the State, or allowing the Counties, cities, or towns to do so, the Constitution itself ordains that such legislation is void unless the bills have passed three separate readings, on three different days, and unless the yeas and nays on the second and third readings shall have been entered on the Journal. The bill may, in point of fact, have been read three several times and on three different days, and the yeas and nays may have been actually called on the second and third readings and the presiding officers may have certified thereto, and yet, if the entry of the yeas and nays is not actually made on the Journal, the Constitution speaking with absolute clearness says that the failure of such entry is *absolutely* fatal to the validity of the Act. The entry, showing who voted on the bill and how they voted, must be made before the bill can ever become a law. The Constitution does not allow the certificate of the presiding officers or any other power to cure such an omission. The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the Constitution are not a condition precedent to the validity of the Act. But, in that class of legislation, the purpose of which is to legislate under Section 14 of Article II of the Constitution, a literal compliance with the language of that section is a condition precedent and one which must be performed in its entirety before the bill can ever become a law. This point, however, has been so recently and so thoroughly discussed in the case of *Bank* v. *Commissioners*, *supra*, that it will be unprofitable to enter into another protracted discussion of it here. The authorities there cited are numerous and most of them directly in point.

This case is clearly to be distinguished from that of *Carr* v. *Coke*, 116 N. C., 223, and the difference cannot be pointed out more clearly than was done by CLARK, J., who delivered the opinion in *Bank* v. *Commissioners, supra*, in the following language: "This case has no analogy to *Carr* v. *Coke*, 116 N. C., 223. That merely holds that when an Act is certified to by the speakers as having been ratified it is conclusive of the fact that it was read three several times in each House and ratified. Const. Art. II, Sec. 23. And so it is here; the certificate of the speakers is conclusive that this Act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this Act was read on three several days in each House and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further as to Acts authorizing the creation of bonded indebtedness by the State and its Counties, cities and towns, than the fact certified to by the speakers of three readings in each House and ratification. This organic provision plainly requires for the validity of this class of legislation in addition to the certificates of the speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House. It is provided that such laws are "no laws" *i. e.*, are void unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."

But the defendant for his protection presents the view that, even if it be conceded that the Acts above referred to were not passed according to the requirements of the Constitution and for that reason might be held void by this Court, yet the commissioners of the County had the right to submit the question of subscription, embracing the question of issue of bonds and the levy of taxes to pay the same, principal and interest, to the voters of the County, and, upon approval by a majority of the qualified voters to issue the bonds under Sections 1996, 1997, 1998, 1999 and 2000 of *The Code*. All the Sections of *The Code* were enacted by having been read three several times in each House of the General Assembly, having passed three several readings on three different days in either House, the yeas and nays on the second and third readings having been entered on the Journals of the Senate and House of Representatives respectively.

But did the sections above mentioned give additional and complete authority to order the election, issue the bonds and levy the taxes to pay them, principal and interest? Section 1996 is in these words: "The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the County may have an interest." It will be necessary, in order that that Section may be construed to give authority to the Commissioners to issue the bonds, that the language should include a railroad not begun to be built before the subscription was made; that the word "*completion*" should be construed building or construction, extending even to the building of a new road; for in the case before us it appears that the road had not begun to be built. We cannot see why the word "completion" should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words "to complete" are understood to mean to finish, to fulfill, and the word "completion" to mean the finishing or accomplishing in full of something which has already been commenced, as for instance, it is most frequent to hear the word "completion" used in connection with the finishing years and months of the education of the young. It is said of the young man or the young woman that he or she has gone for this year or this session to a certain university for the completion of his or her education; the training or educational process having been going on for years.

If there is uncertainty as to the meaning of the word "completion" as used in Section 1996 of *The Code*, we might invoke the aid of Section 4 (formerly 5) of Article V of the Constitution, in its analogy to the *Code* section, to clear it up. The part of that section of the Constitution pertinent to this matter reads as follows: "And the General Assembly shall have no power to give or lend the power of the State in aid of any person, association or corporation, except to aid in the *completion* of such railroads as may be *unfinished* at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

Thus it appears that all gifts or loans by the State in aid of the completion of such railroads as had been begun but which were unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, could be made valid by simple Act of Legislation. The Act of 1868–'9, Chapter 171 (now Sections 1996, 1997, 1998, 1999 and 2,000 of *The Code*) was enacted a few days more than a year after the ratification of the Constitution of 1868. It is most reasonable to conclude that the policy and purpose of both the Constitutional provision and the Statute were the same, the only difference being that in case of State aid no approval by a vote of the people was required, while a majority vote of the people was required in cases of County aid. The object of the Statute must have been to provide by a general Act means by which the counties, without special legislation for each County by separate bills, might be enabled to complete unfinished railroads in which the Counties had a pecuniary interest. At the time of the enactment of the Statute of 1868–'9 and always since that time any County of the State, duly observing the limitations of Section 7 of Article VII of the Constitution and under an Act passed according to the requirements of Section 14, Article II of the Constitution, could and can subscribe to the capital stock of the railroad company whether unfinished or to be begun. The Act of 1868–'9 however, considering the condition of affairs then existing, that is, that there were Counties which had a pecuniary interest in railroads that had been begun but were unfinished, enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by a general law passed according to Section 14, Article II of the Constitution. This reasoning leads us to the still further conclusion that, at the time when the Act of 1868–'9 was brought forward in *The Code*, Section 1996, and the four succeeding Sections, it could have had reference to no cases except those where the Counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868, and that, therefore, *The Code* Sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889.

We have given to the matters embraced in this case a patient and thorough consideration. We are aware of the hardships and losses that may follow from our decision, and we are also aware of the probable complaints likely to be made by persons interested. But the Constitutional requirement which we have discussed is clear in its meaning and in its language, and it is also mandatory. We must obey it in our interpretation of its meaning. Investors in such securities who may meet with losses have no one to blame but themselves, for the Journals of the General Assembly are open to public inspection, and the Constitution of the State is a part of the public literature. The purchaser of real estate with us must look to the depository of his title for the security of his purchase, and so must the investors in our State and County and municipal bonds look to the Constitution and the laws for the safety of their investments.

We find no error in the ruling of the Court below.

No error.

FURCHES, J. concurring: As I concurred in the opinion of the Court in *Carr* v. *Coke*, 116 N. C., 223, and also in the opinion of the Court in *Bank* v. *Commissioners*, 119 N. C., 214; and as it was claimed on the argument in this case that the two opinions were in conflict, and could not stand together, I propose, in addition to the well considered opinion of Justice MONTGOMERY, to say briefly, what seems to me to constitute the distinction between the two cases.

The power to legislate is not conferred on the General Assembly by the Constitution. This it has without an express delegation of power. There are instances where the legislature is commanded to legislate. But these are the exception to the general rule and have nothing to do with the Act we are considering. The most of the provisions of the Constitution with regard to legislation are restraints upon its power.

The Act considered in the case of *Carr* v. *Coke*, was passed under the general and inherent right to legislate. This being so, it fell under the general parliamentary law of authentication, and the signature of the presiding officers was final. But the Act now under consideration was passed under one of the restrictions or prohibitions placed upon the legislature by the Constitution, Art. 2, Sec. 14, which provides "that no law shall be passed to raise money on the credit of the State, &c., unless it be read on three several days in each House, and on the two last readings the yeas and nays are taken and recorded and this rule applies to counties, towns, cities, &c.

It must be admitted that the Constitution might have prohibited the legislature from passing any Act to lend its credit, or to authorize any county, or town to do so. Suppose, then, that the Constitution had prohibited the enactment of any such law, but notwithstanding this inhibition the Legislature had passed such an act, and the presiding officers had signed and ratified it, should the Courts have gone on and enforced this Act because it had passed and ratified by the presiding officers of the two Houses? And if not, why should this Act be enforced, passed in a way in which the Constitution says it shall not be passed—so as to authorize a County to raise money upon its credit?

Suppose the Legislature should pass an Act providing for the payment of the special tax bonds, or the interest thereon, and the bill should be signed and ratified by the presiding officers of each body of the General Assembly: should this Court enforce this Act? I must suppose that the answer to this proposition would be no; that the Constitution prohibits the Legislature from passing such an Act. And, if such an Act as this could not be enforced because the Constitution prohibits its enactment, it would be difficult to draw the distinction and to see how we could enforce this Act, passed in a way the Constitution says it should not be passed.

I have had trouble in coming to the conclusion that we, as a co-ordinate department of the government, could look to the manner of its passage. But upon further consideration of the matter, I have come to the conclusion that these rules, preventing us from looking behind the ratification, are only applicable to Acts passed under the general power of legislation. The precedents I have examined grew out of legislation under the general unrestricted power as to legislation. To adopt this rule with regard to restricted or prohibited powers would be, in effect, to destroy these restrictions, these wise and beneficent provisions of the Constitution. In this it seems to me, lies the distinction between *Carr* v. *Coke* and *Bank* v. *Commissioners*, and this case falls under the rule governing in *Bank* v. *Commissioners.*

It is claimed that this is an Act of repudiation on the part of plaintiffs, and repudiation is not more distasteful to any one than it is to me. And it may be in a moral sense repudiation, but it cannot be in law, as the plaintiffs were never legally bound for these bonds.

CLARK, J., concurring: So far from the decision in *Carr* v. *Coke*, 116 N. C., 223, conflicting with the decision of this case, it is the strongest vindication of the wisdom and necessity of placing Article 14, Section II, in the Constitution. In *Carr* v. *Coke*, the majority of the Court felt constrained to hold that a bill of a general legislative nature and not imposing a tax, when authenticated by the certificate and signatures of the Speakers, could not be impeached, though it was averred in the complaint and shown by the Journals that such bill had, in fact, been tabled on the second reading in the House in which it had been introduced, and consequently had not reached the other House at all. This being so, if the people should desire by constitutional amendment or by a provision inserted by a constitutional convention to require other safeguards of the actual passage of laws than the signatures of the Speakers, can there be any doubt that they have the power to do so? Now, as to the passage of the class of bills specified in Section 14, Article II, they had the foresight to do this very thing and to require additional guarantees by providing that such bills should not become laws unlesss read on three different days in each House and unless "the yeas and nays on the second and third readings *shall have been entered* on the Journal," which Journal, Section 16, of the same Article requires to be "printed and made public immediately after the adjournment of the General Assembly." As to such matters, in which great amounts of money are at stake, the public were not willing to run the risk of bills being palmed off as Statutes through the inadvertence of the Speakers or the venality of Clerks of the General Assembly, without having, in fact, been enacted. These additional requirements are not mere technicalities, but indispensable safe-guards which experience has caused to be inserted in the Constitutions of many of the States to protect the public against the grossest abuses in the creation of indebtedness or authorizing taxation by the State, Counties and towns. *Carr* v. *Coke* holds that as to bills not embraced in Section 14 Article II, the certificate of the Speakers is conclusive evidence of passage and the Courts are powerless to go behind their signatures. The decision in this case holds that, as to the class of bills referred to in Section 14, such certificate is expressly made not sufficient, and the bills are not laws unless the additional requirements of that Section appear by the Journal to have been complied with.

There is no conflict between the two decisions, and this has heretofore been pointed out in *Bank* v. *Commissioners*, 119 N. C., 214.

FAIRCLOTH, C. J., dissenting: The facts are stated in the opinion of a majority of the Court and I will simply state my position briefly. My reasoning is stated in *Carr* v. *Coke*, 116 N. C., 223. In that case it was held that where a bill had been duly signed by the presiding officers of the Assembly, the Court cannot go behind such ratification to inquire how the bill was passed. The ratification is a record and concludes the matter. It does not certify that the bill was read three times or a less number of times. *Omnia presumuntur*, etc. It is argued, however that the case above stated applies when the Assembly is legislating under its inherent power unrestricted by the Constitution, and that that principle does not apply when legislating under restricted clauses of the Constitution, as in this case under Article II, Section 14, *i. e.*, that in one instance the ratification is a record and conclusive, and in the other instance the ratification means nothing because one section of the Constitution is restrictive and the other is not. I cannot reach that conclusion.

Article II, Section 14, saying that no law shall be passed to allow Counties, etc., to raise money on their credit, etc., unless the bill shall have been read three times, etc., is a restriction directed to the Legislature, and no such indebtedness can be imposed except by a majority vote of the tax payers at the ballot box. That Article and Section do not declare that any legislative Act under it is void, but leaves much to the judgment and discretion of the Legislature.

But is the distinction well taken? Article II, Section 12, declares that, "The General Assembly shall not pass any private law unless it shall be made to appear that thirty days notice of the application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law." This is a restrictive clause, and yet in *Brodnax* v. *Groom*, 64 N. C., 244, it was held by this Court that if a private Act for the purpose of levying a special tax for the County be certified by the presiding officers of the two branches of the Legislature, as duly ratified, it is not competent for the judiciary to go behind such *record* and inquire collaterally whether the thirty days notice of an application therefor, required by the Constitution, had been given. Pearson, C. J., said: "We do not think it necessary to enter into the question whether this is a public local Act or a mere private Act, in regard to which thirty days notice of the application must be given; for, taking it to be a mere private Act, we are of opinion that the ratification certified by the Lieutenant Governor and Speaker of the House of Representatives makes it a "matter of record" which cannot be impeached before the Courts in a collateral way. Lord Coke says "a record, until reversed, importeth verity." There can be no doubt that Acts of the Legislature, like judgments of Courts, are matters of record, and the idea that the "verity of the record" can be averred against in a collateral proceeding is opposed to all of the authorities." The Courts must act on the maxim, *omnia presumunter*, etc. And so, if the distinction is sought to be applied to the many sections of the Constitution on various subjects, whether restrictive or general, the law might change as each case was presented.

The Legislature has a general power to levy and raise taxes. Article V, Section 1. When the *power* of taxation is conferred, it is difficult for the Courts to enforce restraints imposed by the Constitution upon the *procedure* of the Legislature in passing the necessary laws for the exercise of the *power*. That is saying to a co-ordinate branch of the Government, "you have not done your work or duty with a proper degree of precision and we will declare it void." When the prohibition is absolute, then the Courts may declare the result void, not on the ground of irregularity in the Legislative proceedings, but because the *power* does not exist, whether the proceedings were regular or irregular. For instance, Article I, Section 1, declares that, "The State shall never assume or pay or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States" unless the proposition to pay such debt shall be submitted to the people and ratified by them by the vote of a majority of all the qualified voters of the State, at a regular election held for that purpose. Here, we find a restriction, not on the procedure of a co-ordinate branch, but an absolute prohibition and denial of *power*, which the Courts can see on the face of the Constitution, without looking at the Journals of the Assembly, and without impeaching the record of ratification.

It is argued that the legislative Journals are public documents and open to the inspection of the purchasers of the bonds in question. That is true, and it is equally true that they were open to the plaintiffs and the tax payers of Stanly County when they held forth these bonds to the public and received the money for them and invested the same for the permanent improvement and benefit of their County. They have recognized and paid the annual interest on their bonds for several years without objection, and it is *possible* that they never discovered the absence of the words "yea" and "nay" on the Journals, until since the decision of this Court in *Bank* v. *Commissioners*, 119 N. C., 214.

I think the true principle is found in the first two cases cited *supra*.

GEORGE HOLMES et al. v. THE SAPPHIRE VALLEY COMPANY.

Action to Recover Land—Defective Description in Deed—Parol Evidence.

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to *find* but not to *make* a corner.

CIVIL ACTION to recover land tried before *Brown, J.*, and a jury at Spring Term, 1897, of JACKSON Superior Court. At the conclusion of the plaintiffs' testimony, his Honor intimated that they could not recover on account of the insufficiency of description of the land in the deed upon which they relied, whereupon plaintiff submitted to a non-suit and appealed.

Mr. Walter E. Moore, for defendant (appellee).
No counsel *contra.*

FAIRCLOTH, C. J.: Plaintiff sues for possession of 640 acres of land. His title is denied by defendant. After the introduction of evidence was closed, his Honor being of opinion that plaintiff had failed to locate the lands described in the complaint, the plaintiff took a non-suit and appealed.

The plaintiff's evidence was a State grant to E. H. Phipps, No. 1695, dated December 28th, 1854, and several *mesne* conveyances. There were some objections to the reading of these *mesne* conveyances on the trial, but the case turns on the sufficiency of the grant No. 1695, to Phipps and the evidence to locate land in dispute.

The description in the grant No. 1695 was "640 acres lying and being in the County of Macon on the waters of the Toxaway River; beginning at a large chestnut, runs thence S. 25 W. 320 poles to a rock at the head waters of Thompson river, thence N. 65 W. 320 poles to a stake in a laurel; thence N. 25 E. 320 poles to a stake; thence S. 65 E. 320 poles with Johnson's and Francis' line to the beginning."

T. B. Reed testified.—Sometimes I follow surveying. Was on survey in this case. Found marked chestnut at A.; two hacks on it, indicating, in surveying, a line tree. Knew Wm. Chandler; he is dead; was 78 years old. He lived for many years near these lands. Some few years ago, and before this suit commenced, Mr. Chandler pointed out this tree to me and said it was a corner of one of the Woodfin surveys; did not say which one. I refer to the chestnut. On this survey we began there, in running the Phipps grant No. 1695. Did not find any rock at end of first call, which is thence S. 25 W. 320 poles to a rock at head-waters of Thompson River. The head of Thompson River is two and one-half miles off from there. There were several Woodfin surveys in this section. Some Woodfin surveys run a good ways, and one some distance off. There are eight or ten Woodfin surveys. I don't know myself that there are any other Woodfin surveys in this locality. There is a rock about the size of a small house over the ridge, about twenty-three poles from point where poleage gave out. It is on south, or Thompson River, side of Bear Pond Ridge. This rock is two and one-half miles from head spring of Thompson River. I found a number of large rocks there, but found no rock as large as the one I refer to, and no other rock likely to be called for as a corner or selected as such. The course we ran from the big chestnut (being the first call of the Phipps grant) would not bring us to this rock. The rock is several poles further east, and twenty-three poles from the point where poleage gave out. I think this chestnut is on Francis and Johnson line.

S. W. Reed testified substantially to the same as T. B. Reed.

This is not an effort to establish boundary lines by course and distance, by marked trees and corners or by calls for natural objects and the like, but is an effort to identify and locate the first station by evidence. The description in the grant No. 1695 is not as definite as it ought to be, but if we assume it can be aided by parol evidence in fitting the description to the land, then the only question is, does it have that effect? It appears to the Court that it does not. It will be observed that the first line leading away from the "chestnut" has no chops or signs indicating a line, nor has the fourth line returning to the chestnut any such signs. There is a rule that the station, sought to be fixed, may be found at the cross or intersection of two lines run and measured by reverse bearings, but that can only be when the two lines start out from established or admitted corners. That rule will not help in this case, because the second, third and fourth corners, both by the grant and the evidence, are more indefinite than the chestnut, which has some marks on it. The boundaries would depend solely on course and distance if the first station (chestnut) could be located. The proof would apply as well to any of the Woodfin surveys as to the one claimed by the plaintiff. It fails to locate or identify any chestnut with reasonable certainty. If the evidence was allowed to locate the first station, that would be making a beginning corner instead of finding one, as nothing is described. *Hinchey* v. *Nichols*, 72 N. C., 66.

No error.

ELIZA CUNNINGHAM v. JOHN CUNNINGHAM.

Husband and Wife—Earnings of Wife—Evidence—Trial—Instructions.

1. Where, on the trial of an action, a deposition was objected to on the ground that the party offering it had failed to show that the deponent was out of the State or resided more than 75 miles from the place of trial, it was proper to allow the deposition to be read after the party offering it had, in answer to the objection, offered evidence tending to show, in the opinion of the trial Judge, that the witness was not in the State.
2. While, in law, the earnings of a wife belong to the husband, he may give them to her or recognize and treat her as the owner of them, provided no creditors intervene.

3. Where, on the trial of an action by a widow to have the heirs of her deceased husband declared trustees for her in land alleged to have been paid for with her own earnings but conveyed to her husband through fraud or mistake; and no creditors intervened, and it was in evidence that the plaintiff and her daughter had paid for the land out of their earnings, it was not error to refuse an instruction that, if the jury should find from the evidence that the land was paid for by such earnings, the plaintiff could not recover since, as a whole, the instruction prayed for would have been erroneous.
4. Error not excepted to on the trial below will not be considered in this Court unless apparent upon the record.

CIVIL ACTION to have defendants declared trustees for plaintiff and to have a conveyance to her of a tract of land, tried before *Norwood, J.*, at Fall Term, 1897, of TRANSYLVANIA Superior Court.

In the complaint the plaintiff alleged that the land was bought with her own money and that, in making the deed, it was by mistake or fraud executed to her husband instead of herself. The material allegations were denied in the defendant's answer. The issues and responses were as follows:

1. "Did plaintiff purchase and pay for with her own money the land described in the complaint?" Answer "Yes."

2. "Was the title wrongfully made to her husband, Charles Cunningham?" Answer "Yes."

3. "Did plaintiff pay for the improvements put on said lot with her own money?" This issue was withdrawn from the jury and the defendants excepted.

The facts are summarized in the opinion of the Court.

The charge of the Court below was that according to all the evidence in the case the land was purchased with the earnings of the wife, the plaintiff in the action, and her daughter; and that if the jury believe the evidence they should find that the land was paid for with the earnings of the plaintiff and her daughter. Defendant excepted.

The Court further charged the jury that, if they should find that the husband consented for his wife to have her earnings, and agreed to take the same and apply them to the purchase money of the land, and thereupon did receive said earnings from her and applied the same to the payment of the purchase money, as claimed by the plaintiff, they should answer the first issue "Yes." Defendants excepted to this instruction on the ground that it was an erroneous statement of the law and also because there was no evidence to support it, and the same was therefore inapplicable. There was a verdict for plaintiff followed by the judgment declaring the defendants to be trustees for the plaintiff and directing them to execute a deed to the plaintiff, and defendants appealed.

Mr. Geo. A. Shuford, for defendants (appellants).

No counsel *contra.*

FURCHES, J.: The plaintiff, who was a widow with one daughter 14 or 15 years old, married Charles Cunningham sometime before 1888, and, after the marriage, purchased a vacant lot in the town of Brevard from Duckworth.

This purchase was probably by parol, as no bond or written contract seems to be mentioned.

After the marriage of Charles and the plaintiff, she and her daughter worked at a hotel in Asheville, for which the plaintiff received the price of their wages. With the money thus acquired, and by other monies and by property acquired by the plaintiff, she paid Duckworth for the lot, upon which there have been placed some improvements. These improvements seem to have been paid for by the labor of the plaintiff and that of her husband Charles.

There was evidence tending to show that the plaintiff handed Charles the money she and her daughter had earned in Asheville, telling him at the time to take it to Duckworth to finish paying him for the land, and to get a deed. And she testified without objection that the land was to be hers and the deed was to be made to her. It was also in evidence that Charles said it was his wife's land; that she had paid for it; that he said to her "it is your land and if you want help to build a house on it, you may do without a house."

The deposition of one Waiters, was introduced by plaintift, which tended to prove that the plaintiff gave Charles the money earned in Asheville, with instructions to pay for the lot with it, and that Charles said it was his wife's property. This deposition was objected to upon the ground that plaintiff had failed to show that Waiters was out of the State, or resided more than 75 miles from Brevard. To meet this objection, the plaintiff offered testimony to the effect that Waiters' family lived in Asheville; that his occupation was that of a head-waiter at a hotel; that two weeks before, he was seen by a witness on board the train and said he was going to New York to act as head-waiter in a hotel there, and that he had not been seen in Asheville since. Upon this evidence, the Court overruled the objection, allowed the deposition and the defendants excepted. This exception can not be sustained. There was evidence tending to show that Waiters was not in the State, and upon this evidence, it became a question for the Judge to determine, and his decision is not reviewable in this Court.

Defendants contended that the earnings of the plaintiff and her daughter belonged to the husband Charles, and asked the Court to charge the jury that if they found from the evidence that the lot was paid for by their earnings, the plaintiff could not recover. The Court declined to give this prayer and the defendants excepted.

The law is that the earnings of the wife belong to the husband. *Syme* v. *Riddle*, 88 N. C., 463. And while this is the law, the prayer for instructions, as a whole, was erroneous. The Court could not instruct the jury that, if they found that the lot was paid for with the earnings of the wife, the plaintiff could not recover, as there was evidence tending to show that Charles treated this money as that of the wife, *Hairston* v. *Glenn*, 120 N. C., 341; that she did not only earn the money, but she collected it and gave it to Charles with instructions to pay it to Duckworth for the land she bought from him; and that Charles took the money from her, under these instructions, and paid it to Duckworth for the land. A married woman may buy and hold land, and her husband may be her agent. *Bazemore* v. *Mountain*, at this term. This evidence and the evidence that Charles said it was his wife's money and treated it as hers, was sufficient to entitle the plaintiff to have the question submitted to the jury as to whether Charles had not agreed that this money, plaintiff used in paying for the lot, should be her money.

There is no intervention or claim of creditors in this case. Charles died intestate, leaving no issue surviving him. And this is a contest between his widow, the plaintiff, and his brothers and sisters, who are defendants. This being so, Charles had the right to give his wife's earnings to her, or to recognize and treat her as the owner of her own earnings. *Hairston* v. *Glenn*, *supra*.

The Judge being at liberty to disregard the prayer of defendants for instructions, as it was erroneous in part, left the case without exceptions, except the one we have treated as to the deposition of Waiters. And while the charge of the Court is not as complete as it might have been upon the husband's right to the earnings of his wife, we fail to see error in the charge, so far as it was given. But, if there had been error, we could not have considered it as it was not excepted to. *State* v. *Blankenship*, 117 N. C., 808, and cases cited.

And as it appears to us that substantial justice has been done between the parties, the judgment must be affirmed.

Affirmed.

C. W. BROADFOOT v. TOWN OF FAYETTEVILLE.

Statutes, Constitutionality of—Exclusive Privileges—Equal Protection of the Laws—Fourteenth Amendment to U. S. Constitution—Owners of Stock Running at Large in Town—Discrimination.

It is not unconstitutional for the Legislature to prescribe that resident owners of stock found running at large in a town shall pay a higher penalty than non-resident owners, it being a discrimination forbidden neither by Article 1, Section 7 of the Constitution of the State nor by the 14th Amendment to the Constitution of the United States.

ACTION of claim and delivery tried before *Coble, J.*, at Spring Term, 1897, of CUMBERLAND Superior Court. The plaintiff who lives within a mile beyond the corporation limits of Fayetteville brought the action to recover possession of his cow which had been impounded by the Town authorities of Fayetteville and was held for the payment of one dollar poundage allowed by the charter of the town or acts relating to it to be charged for stock running at large in the town. Chapter 154, Acts of 1895, prohibits any town in Cumberland County from charging non-resident owners for stock running at large in the town more than one fourth of the penalty charged to residents and relieves entirely from the penalty non-residents of stock so running at large who live more than a mile from the corporate limits of the town. The plaintiff tendered the sum of twenty-five cents which was refused. The defendant contended that the Act, Chapter 154, Acts of 1895, was unconstitutional in that it violated the provisions of Article I, Section 7, of the Constitution of North Carolina and the 14th Amendment to the Constitution of the United States. His Honor gave judgment for the plaintiff and defendant appealed.

Mr. G. M. Rose, for plaintiff.
Mr. H. McD. Robinson, for defendant (appellant).

CLARK, J.: It was admitted by both parties that the result of this appeal depended upon the constitutionality of Chapters 141 and 154 of the Acts of 1895. These two Acts are substantially identical save that the first applies to the whole State while the latter is applicable to Cumberland County only. The first Section is aimed at the offence of driving live stock into a city, town or other territory in which live stock are forbidden to run at large, with intent to secure the penalty or to injure the owner, or for hire or reward. Violation of this Statute is made a misdemeanor. The second Section, presumably with the object of discouraging the perpetration of the offence denounced in the first Section, provides that the poundage or penalty upon the stock of non-residents of a town or city, which is authorized to impound stock running at large therein, shall not be more than one fourth that levied upon residents, and further that when non-resident owners of cattle taken up in said town live more than a mile from said City limits, there shall be no poundage charged. Chapter 141 differs from Chapter 154 in that it exempts such last named owners of stock, not altogether, but only for the first three times that the same cattle are impounded. But Chapter 154, which applies to Cumberland County only, governs in this case, as it was ratified later.

It was seriously argued to us that these Acts are unconstitutional because in violation of Article 1, Section 7, of the Constitution of North Carolina, which forbids exclusive privileges and emoluments to be granted to any set of men. Then, it was further urged that the Acts were obnoxious to the inhibition of the 14th Amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of its laws. We find in the Statute, however, no violation by the legislature of the organic law of the State or the United States, but simply a police regulation. The Act is based upon the idea that residents of the town, who know that stock are not allowed to run at large therein, are more blamable for permitting them to do so than non-residents whose stock (turned out where it is permissible) by chance, or perhaps driven by some one who wishes to make a profit thereby or injure the owner (as is indicated by the first Section of the Act), get into the town limits and violate the majesty of its ordinances.

The Statute further takes cognizance of the ordinary things of life in proceeding upon the assumption that the stock of owners living more than a mile from town are so little disposed to leave their native meadows and ranges in order to tramp the barren streets and sidewalks of the distant town; that their doing so is not attributable to negligence in their owners, and is more likely to be caused by designing persons. Hence, in the County of Cumberland, such distant owners are not punishable at all, and under the general Act (Chapter 141) only when the same stock have developed such fondness for the town as to have been caught parading its streets three times before.

In these provisions we see no "exclusive or separate emoluments or privileges" to any set of men. It was once contended that non-residents, not being subject to town regulations, were not liable at all when their stock invaded the town limits. But it was held that they were, as legislation then stood. *State* v. *Tweedy*, 115 N. C., 704; *Rose* v. *Hardie*, 98 N. C., 44; *Whitfield* v. *Longest*, 28 N. C., 268; *Hellen* v. *Noe*, 25 N. C., 493. But in this there was no denial of the power of the legislature to provide that owners of cattle which should stray a mile or more to get into the town limits (which they were so little likely to do of their own volition or by that of their owners) should be exempt from the penalty visited upon residents of the town, who should negligently or intentionally let their cattle roam the streets, and that those living outside the town limits but within a mile should be punished less than residents of the town. The latter know that their stock must roam the town if turned out at all. Non-residents do not. It has never been held that the special privileges and advantages given the residents of towns by town charters come within the constitutional inhibition against special privileges, and neither can it be justly contended that an exemption partial or entire, of non-residents, from the penalty for violation of a town ordinance by their stock is unconstitutional. Residents in the country receive none of the benefits, and if they are made exempt from some of the burdens, of the towns which depend upon them for existence and support, the grievance, if any results, must be removed by the legislature.

Still less is this legislation obnoxious to the "14th Amendment" which is now invoked on all occasions, and if given the scope which has been claimed for it, would swallow up the jurisdiction of the State Courts as to every matter. It would be like the old fiction of *Quo Minus* by which, in England, the Exchequer Court, which had jurisdiction only over matters touching taxation, drew into itself both common law and equity jurisdiction of all other actions (which it was not intended to have) upon the fiction that by committing any injury or damage upon the plaintiff, or failing to pay a debt due him, *quo minus sufficiens existit*, he is less able to pay his taxes. 3 Blk. Com., 45. But this attempt to make a modern *quo minus* and an Aaron's Rod of a Constitutional Amendment, which was enacted to protect a recently emancipated race from inequality before the law, has been so often rebuked by the Supreme Court of the United States that it is only necessary to cite a few cases—*Slaughter House Cases*, 83 U. S., 36; *Pembina* v. *Penn.*, 125 U. S. 188; *Re Kemmler*, 136 U. S., 448. "Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connelly*, 113 U. S., 32. It "does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions." *Hayes* v. *Missouri*, 120 U. S., 71. In *Missouri Railroad Co.* v. *Mackey*, 127 U. S., 107, the Court held that a Statute of Kansas, making railroads responsible for injuries sustained by their employees when caused by the negligence of fellow servants, was valid and not forbidden by the 14th Amendment although the Act did not apply to any other corporations than railroads, nor to other employers. The same ruling was made, as to a similar Statute in Iowa, in *Railroad Co.* v. *Herrick*, 127 U. S., 109, and has been cited and approved in *Railroad Co.* v. *Matthews*, 165 U. S., (November 1896), which reviews the whole subject and holds, citing many decisions, that as a rule Statutes making classifications are not forbidden by the 14th Amendment, when they bear equally upon all within each class.

Accordingly it has been often held in this Court that a public local Act making that an offence in one district which is not so in another is a constitutional exercise of the police power, if the Act bears alike on all persons within a defined locality, and is within the discretion of the legislature, as local prohibition Acts. *State* v. *Joyner*, 81 N. C., 534; *State* v. *Stovall*, 103 N. C., 416; *State* v. *Barringer*, 110 N. C., 525;

State v. *Snow*, 117 N. C., 774; or restricting the sale of seed cotton in certain localities. *State* v. *Moore*, 104 N. C., 714.

Here, three districts are created, *i. e.*, the town limits, the territory within one mile of the town limits, and the territory beyond the one mile. The law is uniform and bears alike upon the residents within each of the designated districts. It is not a discrimination between persons, but a Statute applying differently to different districts. A somewhat similar instance is the dividing a city into small districts for local assessments for improvements, those in each district being taxed at a different rate from those in others. *City of Raleigh* v. *Peace*, 110 N. C., 32; *Hilliard* v. *Asheville*, 118 N. C., 845; *Walston* v. *Nevin*, 128 U. S., 578. While not exactly analogous, the decisions on this point demonstrate that such and similar matters are not withdrawn from legislative action by any prohibition in the State or Federal Constitution.

No error.

L. C. CALDWELL v. J. W. WILSON.

Practice—Appeal—Docketing Appeal—Advancing Case for Argument.

1. Although the Clerk of the Superior Court is allowed twenty days from the filing of the case on appeal in which to send up the transcript, yet he may do so at once without taking the whole twenty days or requiring his fees to be paid in advance, and if he does so the case is regularly constituted in this Court and the appellant cannot complain.
2. Where an action involving title to public office is tried after the beginning of a Term of the Supreme Court and, on appeal from the judgment rendered, by observing the Statutory regulations, has come to such Term of the Supreme Court after the call of the District to which the cause belongs, the Court can, under Rule 13, set the case down for argument, though it is not entitled to be heard as of right.

Motion to advance the cause made by plaintiff.

Mr. A. C. Avery, for plaintiff.
Mr. R. O. Burton, for defendant (appellant).

Per Curiam: This case was tried below since the first day of the present Term of this Court. If the appeal had not been docketed here till the call of causes from that District at the next Term of this Court, it would have been in time. Rule 5. But the same rule provides that it may be docketed at this Term and the Court has often held that if, by complying with the Statutory provisions as to time in settling cases, the appeal gets here at this Term before the expiration of the time for docketing cases from that District, it stands regularly for argument at this term. *Avery* v. *Pritchard*, 106 N. C., 344, (at bottom of page 346); *Porter* v. *Railroad*, Ibid, 478; *State* v. *Deyton*, 119 N. C., 880. Here, by observing the statutory regulations the appeal has gotten here after that District has been passed and hence is not entitled to be heard as a right, but being a case affecting the title to public office it comes within Rule 13, and the Court may set it down for argument. This was done under similar circumstances in *Houghtalling* v. *Taylor*, at this Term, which involved the title to the office of County Commissioner and was set for hearing some weeks after the call of the District to which it belonged. Like the case before us, it was tried below after the beginning of the present Term of this Court. The appellant's case on appeal was accepted by the appellee on November 22 and filed in the Clerk's office that day. *The Code*, Section 551, then makes it the duty of the Clerk to send up the transcript within twenty days (*State* v. *Deyton*, 119 N. C., 880) though in civil cases he is not required to do so unless his fees therefor are paid, (*Bailey* v. *Brown*, 105 N. C., 127; *State* v. *Nash*, 109 N. C., 822); but, if the Clerk sends it up at once instead of taking the whole twenty days, or does not stand on his right to exact his cost in advance, the appellant cannot complain and the case is regularly here.

The motion of appellant to put the case off the docket has therefore neither merit nor precedent to sustain it, and in view of the importance of the case to the public the appellee's motion is granted and it will stand for argument on Saturday, December 4. If the call of causes from the 10th District has not then been closed, this case will be called on the Monday following.

Motion allowed.

State ex rel L. C. CALDWELL v. JAMES W. WILSON.

Quo Warranto—Railroad Commission—Suspension of Commissioner by Governor—Statute, Constitutionality of—Due Process of Law—Equal Protection of Laws—Right to Trial by Jury—Officer—Acceptance of Office Subject to Provision of Act Creating it.

1. The office of Railroad Commissioner, established by Chapter 320, Acts of 1891, exists solely under the Constitution and laws of this State and was created to administer the Railroad Commission Act and, having no recognition in the laws of the United States and being concerned solely in domestic affairs and trade, does not interfere with inter-state commerce.

2. The object of a summons being to bring the defendant into Court by giving him legal notice, his voluntary appearance, without limiting his appearance, is a waiver of a summons and he is as completely in Court as if he had been served therewith.

3. Where a Railroad Commissioner, holding office under a Statute which makes it the duty of the Governor of the State to suspend him until the next meeting of the General Assembly in case he becomes subject to the disqualifications prescribed in the Statute, is cited by the Governor in writing to appear and answer certain charges recited in the notice as to his disqualification and, in response thereto, appears

or files an answer, such notice is, in effect, a citation and such appearance in person or by answer filed gives complete jurisdiction to the Governor and the consequent action of the Governor in suspending such Commissioner from office, followed by a notification of the suspension and an appointment of his successor, is "due process of law."

4 "Due process" is such process as is due to the particular circumstances of a case according to the law of the land. It does not necessarily imply a regular proceeding in a Court of justice or after the manner of such Courts, and a party cannot be said to have been deprived of his property "without due process" when he has had a fair hearing according to the modes of proceeding applicable to such case.

5. A trial by jury in suits at common law pending in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirement of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial proceedings.

6. It is competent for the Legislature, in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor the right to suspend, the incumbent of the office.

7. The provision of the Railroad Commission Act, (Chapter 320, Acts of 1891) empowering the Governor, in certain contingencies, to suspend a Commissioner whose office is created by the Act, does not interfere with any vested right, but "prescribes" a rule of property in the office and modifies the extent of interest and tenure therein "prospectively," and one taking the office holds it subject to and is bound by all the provisions of the Act.

8. The Railroad Commission established by Chapter 320, Acts of 1891, is purely of legislative origin and is an *administrative* and not a *judicial* Court, and though, by subsequent Statute the Commission was made a Court of Record, the object and effect of such amending Statute was simply to give authenticity to its records and proceedings and added nothing to its duties and powers.

9. A Statute creating a Railroad Commission, which prescribes that the Commissioners shall not be or become interested in any wise in any railroad, &c., is not unconstitutional because the qualifications required are in addition to those prescribed by the Constitution, such provisions being intended not to restrict the rights of the individual but to secure the faithful and efficient performance of public duties.

10. Section 1 of Chapter 320, Acts of 1891 (Railroad Commission Act) prescribes that, if either of the Commissioners whose election is provided for by such Act, shall be or become interested in any wise in any railroad company, &c., it shall be the duty of the Governor to suspend him from office until the next meeting of the General Assembly by a majority of which, in joint session, the question of his removal shall be determined. *Held*,

(1) That the power of suspension rests in the hands of the Governor and its exercise in an orderly manner is not reviewable by the Courts.

(2) That the exercise of such power of suspension, after the appearance and answer of a commissioner in response to a citation setting forth the charges of disqualification, is due process of law and not a violation of the fourteenth amendment to the Constitution of the United States.

(3) That such Act does not interfere with the independent tenure of the judiciary, the Commission being an administrative and not a judicial Court.

(4) That whatever right to a trial by jury the incumbent so charged might have had was waived by his acceptance of the office under the conditions of the Statute, so far as the action of the Governor is concerned.

ACTION in the nature of *quo warranto* tried before *Coble, J.*, at November Term, 1897, of IREDELL Superior Court, on complaint and answer.

The complaint was as follows:

"The plaintiff complains and alleges—

1st. That the relator, L. C. Caldwell, is a citizen and tax-payer of Iredell County, North Carolina.

2nd. That the defendant was duly elected Railroad Commissioner by the Legislature of 1893 for the term of six years from the time of his election until expiration of his term.

3rd. That, as the relator is informed and believes, on the 24th day of August, 1897, his Excellency Daniel L. Russell, Governor of North Carolina, addressed and sent to the defendant, James W. Wilson, a communication in the following words and figures, to-wit:

STATE OF NORTH CAROLINA,
EXECUTIVE DEPARTMENT,
RALEIGH, Aug. 24, 1897.

To JAMES W. WILSON, ESQ., *Member of the*
Railroad Commission of North Carolina:

SIR:—By section first of the Railroad Commission Act, ratified the 5th day of March, 1891, it is made the duty of the Governor to suspend from office any Railroad Commissioner who shall be the holder of "any stock or bond of any railroad company, or be the agent or employee of any such company, or have any interest in any way in such company, or in case any one of them shall be disqualified to act." It is alleged that you are the joint owner with Col. A. B. Andrews, the first vice-president of the Southern Railroad, general political manager of the same for North Carolina, of a certain piece of hotel property known as Round Knob, situated on the line of the said railroad; that said hotel property is worth little or nothing except as a hotel and that it is worthless for this purpose except when designated and patronized by the Southern Railroad as an eating-house for their passenger trains; that said hotel property has been unoccupied and unused for any purpose for several years past and has brought in no revenue to you as one of its owners; that it is impossible for you to use, rent or lease said property unless some understanding, agreement or contract could be made with the Southern Railroad Company to designate and patronize the said hotel as a railroad eating-house; that you and the other owner or owners of said hotel property have secured some agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house; and that, by virtue of said arrangements with said railroad, you have been able to lease said hotel property to S.

Otho Wilson, or to his mother through the said Wilson, for profit.

It is further alleged that you have a son in the employment of the Southern Railroad Company at Morganton; that he was appointed to this place by the Southern Railroad Company at your request, and that he was appointed over others entitled to the place by promotion under the practice of the company, and that this was done for your accommodation and at your request.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you acquired any interest in any way in such company in violation of law?

Second. Have you become disqualified to act as a fair judge or commissioner?

Under the law, the Governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the Statute, which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defence. You will therefore please show cause in writing on or before Wednesday, the 1st day of September, 1897, at the Executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice, you will please make answer and proofs in writing, and be there in person, or by counsel, at your election.

DANIEL L. RUSSELL,
Governor.

To which said James W. Wilson in obedience to said order made reply as follows:

AUGUST 30TH, 1897.

TO DANIEL L. RUSSELL,
Governor of North Carolina:

SIR:—Your favor of the 25th, citing me to appear before you on Wednesday, the 1st day of September, and reply in writing to certain rumors or charges from parties unknown to me, and show cause why I should not be removed from the responsible position of chairman of the railroad commission, agreeable to Section 1 of the Act creating this commission, was duly received.

In obedience thereto I herewith submit this, my answer to each charge in the order as given in your letter. It is drawn by myself, and possibly free from the elegant diction which a lawyer would have imparted, but I feel sure it will carry conviction to an impartial mind.

1st. It is not true, as alleged, that I am the joint owner with Col. A. B. Andrews, vice-president of the Southern Railway and general political manager of the same for North Carolina, in a certain piece of hotel property known as Round Knob.

2nd. It is not true that said hotel property is worthless for that purpose except when designated and patronized by the Southern Railway Company as an eating-house for their passenger trains.

3rd. It is not true that said hotel property has been unoccupied and unused for any purpose for several years past and brought in no revenue to me as one of its owners.

4th. It is not true that it was impossible to use, lease or rent said property unless some understanding, agreement or contract could be made with the Southern Railway to designate and patronize the said hotel as a railroad eating-house.

5th. It is not true, as alleged that I with the other owner or owners of said property have secured an agreement, understanding or contract from the Southern Railway Company to abandon other eating-houses and designate Round Knob as an eating-house, and by virtue of said agreements with said railroad that I have been able to lease said hotel property to Otho Wilson, or his mother, through the said Wilson, for profit.

6th. It is untrue, as further alleged, that I have a son in the employment of the Southern Railway Company at my request and that he was appointed over others entitled to the place by promotion under the practice of the company, and this was done for my accommodation and at my request. I hereby denounce these allegations as made to you by many persons as false, and demand the proof.

In explanation I will say that, about 1881, Col. Andrews and myself built this hotel at a cost of about $8,000. It is not worthless, as stated, but is a most convenient and beautiful hotel, with thirty rooms, closets and baths on each floor, and was leased and run as a hotel for several years with no meals supplied to passengers. The property has not been unoccupied for years, as charged, but on the contrary was leased up to last year, at an annual rental of $500 per annum, to a responsible party, with no understanding of any kind with the Southern Railway Company.

In a casual conversation with Mr. Otho Wilson, my recollection is that I spoke of this very desirable property, which was then vacant, the lease of Friscard & Co., having expired, and saying that the superintendent of the road had sent me word that if some one would open and keep a good house he would make it a dinner house; the hotel at Hickory was then closed, and my impression is that Asheville was not then a regular eating-house, but of this I am not sure. Mr. Wilson remarked that his mother was looking around for a boarding house, and that possibly this might suit her, and he would go up and examine the property. This he did, and on his return expressed himself as greatly pleased, but said the former lessee had left the property in bad condition and very dirty. I was aware of this, and replied that, on this account, if his mother would put the place in good repair she could have it the first year free of rent—this much for the profit as charged; the message to me about the eating-house was not intended for Mr. Otho Wilson or his mother, but was sent before Mr. Wilson or his mother ever thought of it, or intended for any person I could get who would keep a first-class table. The management of the property was left entirely to me, and my recollection is that I never mentioned the matter to Col. Andrews until the trade was consummated through Mr. Otho Wilson for his mother.

The land upon which the Round Knob property was located belonged to John Malone, Col. Crockford and myself. This party owed a debt of about $3,000 to R. H. Brown, of McDowell County. I am the only one of the parties now living, and was alone responsible for the debt. For the hotel itself I paid $6,000, Col. Andrews $3,000, Col. Andrews' interest being about one-quarter of the hotel, with about ten acres of land adjoining. Before the receipt of your letter I had no idea that any man in North Carolina seriously considered that my owning a piece of property jointly with Col. Andrews, and held jointly by us since 1881, and now rented by a widow, which being in addition to a summer resort was a dinner station for the passenger trains of the Southern Railway, would ever in any way be so construed as to make me in any form under obligations to the Southern Railway.

Finding, however, by your letter that there were parties who believed or pretended to believe that this was indirectly a violation of the Act, I promptly, under the advice of friends, to avoid "even the appearance of evil," deeded my individual interests in the property to R. H. Brown for his claim of about $3,000, about the value, at the present depreciation, of the property. This was done agreeably to Section 1 of the Act to avoid any criticism by even the captious as to my conduct as Railroad Commissioner, feeling no uneasiness that your fairness as a judge should be so biased as to decide that with the showing made you could, with any pretention of justice, remove me from the office now held by the unanimous support of the Legislature of North Carolina; for this unprecedented compliment I have never before had an opportunity to return thanks.

As to the charges about my son, I will say that he is no minor, as charged, but is twenty-seven years old, and is one of the oldest employees on the division upon which he is stationed. About seven years ago the agent at Morganton resigned. My son was his chief clerk, and in the very line of promotion. V. E. McBee, general superintendent of the Seaboard Air Line, was at that time superintendent of that division; he had previously promised my son, as was told, that he would promote him at the first opportunity. Mr. McBee kept his promise. I have no recollection of it, but it is more than probable that I spoke to Capt. McBee in his behalf. It would have been a most unnatural father who would have done otherwise. I believe this covers the entire bill of charges. But there are other matters of rumor, not in your letter, but calculated to prejudice your mind. I consider it but simple justice to state the facts as to each one. It is charged that, when the Seaboard system was endeavoring to give the people cheap rates, I interfered. The following is a copy of orders in the case. See report of the Commissioners to the Governor, page 213: "It appears from press reports that reduced rates have been again ordered to be put in effect from certain points outside of this State to certain points within, clearly causing a discrimination in violation of the long and short haul clause of the Act creating the Commission. Justice to the local business of the State requires us to take prompt action. It is therefore ordered by the Commission that all roads doing business in the State of North Carolina shall reduce their local tariffs to passenger and freight in the same proportion as has been done by them on their through business."

It was my opinion then that our own folks should have at least as good treatment as outsiders. I drew the order and would do so again under similar circumstances. It is also charged on the streets that the Seaboard system was unfairly dealt with by me in the matter of their proposed change of line at Gaston. The facts are, that the order as given was drawn by Capt. McBee, General Superintendent of the Seaboard Air Line, and in his own writing in this office. By his request, the board adopted it as their order, believing it to be a fair solution of the matter. At least, the Seaboard should be estopped from objecting. The charges as made against me are, in my opinion, so frivolous that they would have been passed unnoticed had they not been considered as of serious importance by one who holds the exalted position that you do. It is also charged that my influence during the session of the Legislature was exerted to prevent a reduction of rates. The last annual report submitted by the Commission, with no difference of views by the Commissioners, gave the rates of freight and passengers considered by us as just and reasonable. In support of our views a comparison of the rates of all the States in the Union was made and published. We were sworn officers and made this report with regard to the solemnity of our oaths. During the session of the Legislature the members of the Commission were invited to appear before the joint committe on

Railroads and give their views as to the justness of the rates now in force. Two of us responded. I, for one, was given a most respectful hearing by the committee. In my argument the report of the Commission was sustained by facts and figures. Nothing since has been shown to convince me that I was wrong. The charge that it was argued by me before the committee that to recommend a change of rates would be reflecting on the Commission is not warranted by the facts; nothing of the kind was ever alluded to by me—in this I am sure that I will be sustained by the committee.

In justice to myself I will say that I never entered the halls of the Legislature during its session, or expressed my views except when solicited to do so by its committee.

These facts have been intended to be given without feeling and in a most respectful manner, and I trust they will be so received by you.

In addition to the facts, I will say that the State of North Carolina has a Constitution which you and I have sworn to support. This Constitution and the laws as expounded guarantee protection to its humblest citizen. To a lawyer of your acknowledged ability, it may appear presumptuous for me to call to your attention Sections 4 and 5, Article 6, of the State Constitution, which reads as follows:

"The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God; second, all persons who shall have been convicted of treason, perjury or of any other infamous crime, etc." See also Article 4, Section 31. Also Article 1, Section 19, of Bill of Rights. This I will copy in full, as it is regarded by every freeman as a bulwark of liberty. It reads as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

See also the 14th amendment of the Constitution of the United States, which forbids any state to deprive a citizen of life, liberty or property without due process of law. See also decisions of our Supreme Court: *Hoke* v. *Henderson*, 4 Devereux; *Cotton* v. *Ellis*, 7 Jones; *Bunting* v. *Gales*, 77 N. C.; *Brown* v. *Turner*, 70 N. C.; *Howerton* v. *Tate*, 70 N. C. Legislature cannot confer on an executive judicial powers. See Cooley on Constitutional Limitations. Act 1891, making Railroad Commission a Court of Record."

And on the 23rd day of September, 1897, the said Governor of North Carolina issued and sent to the defendant the following communication and order:

"EXECUTIVE DEPARTMENT,
Raleigh, N. C., September 23, 1897.

TO JAMES W. WILSON, ESQ.,
Chairman of Railroad Commission.

SIR: Take notice that after due investigation and consideration I am convinced that you have violated the Railroad Commission law in some of the particulars mentioned in my letter to you August 24, 1897, and that you have not only violated said Act in the specification set out in said Act, but that you have otherwise, within the meaning and intent and words of said Act, become disqualified to act.

Now, therefore, in obedience to the duty imposed upon me by said Act of the Assembly I do hereby suspend you from the office of Railroad Commissioner and Chairman of said Commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the General Assembly in joint session. The fact of your suspension together with the reasons therefor and the evidence, documents and information connected therewith will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the Chief Executive I have appointed L. C. Caldwell, Esq., of the County of Iredell, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the Executive to suspend you from office as provided by the Statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and, upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

(Signed) D. L. RUSSELL,
Governor."

To which communication and order the said Governor received the following reply:

"RALEIGH, N. C., September 24, 1897.
To D. L. RUSSELL, *Governor.*

SIR: Yours of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until removed by a tribunal other than a self-constituted "Star Chamber." (Signed) JAS. W. WILSON,
Chairman Railroad Commission."

4th. And therefore the relator avers and so charges on information and belief that on the said 23rd day of September, 1897, his Excellency, Daniel L. Russell, Governor of the State of North Carolina, in pursuance of the power and authority vested in him by Section 1, Chapter 320, of the laws of the State of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of duty devolved upon him by the said Act, suspended the said James W. Wilson from the said office of Railroad Commissioner and as Chairman of said Commission. That on the said 23rd day of September, 1897, the said D. L. Russell, Governor of North Carolina as aforesaid, appointed the relator, L. C. Caldwell, a Railroad Commissioner and Chairman of the Railroad Commission to fill the vacancy caused by the suspension of the said James W. Wilson from said office of Commissioner and Chairman of said Commission from the said 23rd day of September, 1897, to continue until the next General Assembly, shall determine the removal of said James W. Wilson or until your successor is elected and qualified according to law.

5th. That the plaintiff relator duly qualified as Railroad Commissioner and Chairman of said Commission by taking the oath prescribed by law before DAVID M. FURCHES, one of the Justices of the Supreme Court of North Carolina, which oaths were duly deposited in the office of the Secretary of State.

6th. That the plaintiff relator since his appointment and qualification as aforesaid, and before the institution of this action, demanded of the said James W. Wilson that, he, the said James W. Wilson, should vacate the said office of Railroad Commissioner and surrender the same to the relator, and the said James W. Wilson refused to vacate and surrender the said office to the relator in words and figures, to-wit:

"SEPTEMBER 28TH, 1897.

HON. L. C. CALDWELL, *Statesville, N. C.*

DEAR SIR: Your favor of the 25th making your demand for the office of Railroad Commissioner, together with all the papers, records, rights and privileges thereto belonging, was duly served upon me by the Sheriff of Burke County. In reply will say that I most respectfully decline to accede to your request. Yours very truly, JAMES W. WILSON,

Chairman Railroad Commission."

7th. That the defendant James W. Wilson, notwithstanding the suspension from the office of Railroad Commissioner and Chairman of said Commission by the Governor of North Carolina, as hereinbefore set forth, refuses to vacate the same, and does now unlawfully usurp, intrude into, hold and exercise the said office of Railroad Commissioner and Chairman of said Commission, and does now prevent and hinder the relator from performing the duties of said office.

8th. That said office of Railroad Commissioner is an office of trust and profit under the laws of North Carolina.

9th. That leave to bring this action has been given by the Attorney-General of said State, which leave is attached hereto.

Wherefore the plaintiff demands judgment:

1st. That the defendant has been suspended from his office of Railroad Commissioner and Chairman of said Commission according to law.

2nd. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $2,000 in pursuance of the Statute.

3rd. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4th. That the defendant be ousted from and the relator inducted into said office.

5th. For such other and further relief as may be just and right and for costs of this action."

The answer was as follows:

The defendant answering the complaint, says:

1. That section 1 thereof is admitted.

2. That section 2 thereof is admitted. Defendant's term of office began April 1, 1893, and ends April 1, 1899.

3. That section 3 of the complaint is admitted.

4. That section 4 of the complaint is denied. But defendant admits that the Governor undertook or attempted to suspend or remove the defendant from his said office of

Railroad Commissioner and designated the plaintiff's relator, L. C. Caldwell, to fill the vacancy which he had attempted to create.

5. That the allegations in section 5 of the plaintiff's complaint are not true. He admits that said Caldwell has taken the oath prescribed by law for Railroad Commissioner.

6. The defendant admits section 6 of the complaint, except that he does not admit the appointment and qualification of said Caldwell any further than he has hereinbefore admitted the same.

7. That he denies section 7 of the complaint, but he admits that he refuses to vacate his office of Railroad Commissioner and to surrender the same to the relator. The defendant is advised that his suspension was illegal and that he is still entitled to discharge the duties of his office.

8. Sections 8 and 9 of the complaint are admitted.

9. That the General Assembly of North Carolina at its session of 1891 under the authority of the Constitution of the State, Article 4, Sections 2, 12 and 30, passed an Act constituting a Railroad Commission with the powers of a Court, which was ratified the fifth of March, 1891, and under said Act the defendant was elected a member thereof at the session of 1893 for the term of six years; and on the ninth of March, 1891, the General Assembly of North Carolina passed an Act declaring "that the Railroad Commission elected at this session of the General Assembly and their successors in office be and they are hereby created and constituted a Court of Record inferior to the Supreme Court and shall be known as the Board of Railroad Commissioners, and as such shall have all the powers and jurisdiction of a Court of general jurisdiction as to all subjects embraced in the Act creating such Railroad Commission."

10. That the Act ratified March 5, 1891, in section 1 thereof, provides "that said Commissioners shall not jointly

or severally or in any way be the holder of any stock or bonds or the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any Commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same, and in case any Commissioner shall fail in this or in case any one of them shall become disqualified to act, then it shall be the duty of the Governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the Governor shall fill the vacancy, and if the General Assembly shall determine that the Commissioner suspended shall be removed, then the appointee of the Governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended Commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly: *Provided*, that no person is eligible as such commissioner who shall have been an attorney of any such company within twelve months next preceding his election to such office;" but the defendant avers, being so advised, that said provisions are unconstitutional and void.

11. That, as appears byt he complaint, the said Daniel L. Russell, Governor, preferred the charges contained in his

communication of August 24, 1897, which is set out in section 3 of complaint. The defendant appeared before the said Governor at the day fixed and filed a written denial of said charges with only an affidavit from V. E. McBee as follows: "In 1893, I was general superintendent of the Western North Carolina Railroad, and during the said year appointed the said James W. Wilson, Jr., station agent at Morganton, and in making such appointment did so without consultation or conference with Mr. Wilson's father. J. W. Wilson, Jr., had, several years before appointed station agent, served as clerk in the said office and proved himself competent to fill the agency." Defendant also filed testimonials from citizens of Morganton showing the business capacity and fitness of said J. W. Wilson, Jr., for the position of agent at that place. And thereupon the defendant demanded of the said Governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witness. This was refused, the Governor stating that he had no power to subpœna witnesses.

12. That notwithstanding the denials of the defendant and the affidavit in support thereof, the said Governor, without evidence and without a trial, undertook to find generally that the defendant had violated the Railroad Commission law in some of the particulars mentioned in his letter of August 24th, 1897, and that the defendant had not only violated the said act in the specifications set out in said act, but that he had otherwise within the meaning and intent and words of said act become disqualified to act. Thereupon the said Governor, without a more specific finding, undertook to suspend the defendant and deprive him of his said office.

13. The defendant denies that he is the joint owner with Col. A. B. Andrews, the first vice-president of the Southern Railroad, of the Round Knob hotel. He, for a valuable con-

sideration, sold and conveyed the same between the date of the Governor's letter of August 24th, 1897, and August 30th, 1897, by deed to R. M. Brown, as he was entitled to do under the provisions of said Act of the General Assembly.

14. That the defendant denies that the said hotel property is worthless as a hotel except when designated and patronized by the Southern Railroad as an eating house for their passenger trains.

15. That the defendant denies that the said hotel property has been unoccupied and unused for any purpose for several years past, and has brought in no revenue to defendant. Up to 1896 it was under lease for five years to Mieusett and Friscard at an annual rental of $500. This lease expired some time in the fall or winter of 1896. While three years' rent is still due by them it is perfectly good and collectable, and the same is now in suit.

17. That the defendant denies that it is impossible to use, rent or lease said property unless some understanding, agreement or contract can be made with the Southern Railroad to designate and patronize the said hotel as a railroad eating-house.

18. That the defendant denies, except as stated herein, that he and the other owner or owners of said hotel property secured any agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house, and that by virtue of said agreement with said railroad he was able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit. The facts are fully stated in the defendant's letter of August 30th, 1897, set out in the complaint.

19. That the defendant denies that his son, who is now twenty-seven years of age, was appointed agent at Morganton of the Southern Railroad over others entitled to the place

by promotion under the practice of the company, and that this was done for his accommodation. He was in the very line of promotion and was appointed in 1893 by V. E. McBee, former superintendent, in pursuance of a previous promise, as defendant is informed and believes, on account of a vacancy in the office in Morganton. His said son was chief clerk to the agent and was appointed on his resignation. Defendant at first thought he may have spoken to Mr. McBee in favor of his son, but on more careful inquiry and reflection is convinced he did not do so, and he therefore denies that he said anything about it to said McBee.

20. That defendant acquired the Round Knob hotel property in 1881. The hotel was built in 1881, or thereabouts, and has been a railroad eating-house at divers times since its erection.

21. The defendant denies that he has acquired any interest in any way in the Southern Railroad Company in violation of law.

22. The defendant denies that he has become disqualified to act as a fair Judge or Commissioner.

23. That under the laws of North Carolina the defendant has a property in his office, and he demands to have the charges preferred against him tried by a jury in this action.

24. That by the Constitution of the State of North Carolina, Article 6, Sections 1, 2 and 3, it is provided that every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election and ninety days in the county in which he offers to vote, shall be deemed an elector and eligible to office, except all persons who shall deny the being of Almighty God, and all persons who shall have been convicted of treason, perjury or of any other infamous crime since becoming citizens of the United States, or of corruption

or malpractice in office, unless such person shall have been legally restored to the rights of citizenship.

25. That this defendant is in every way qualified to hold office under the requirements aforesaid.

26. That the defendant is advised, and so avers, that any provision of the Railroad Commission Act, Chapter 320 of the Acts of the General Assembly of North Carolina, passed at the session of 1891, which prescribe other and different qualifications for the office of Railroad Commissioner than those laid down by the said provisions of the Constitution, are unconstitutional and void.

27. That the Board of Railroad Commissioners is a Court of Record and the Commissioners are Judges under and by virtue of Article 4, Section 12, of the Constitution of the State by which it is provided, "The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the Government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other Courts prescribed in this Constitution or which may be established by law in such manner as it may deem best, provide also a proper system of appeals, and regulate by law when necessary the method of proceeding, in the exercise of their powers, of all Courts below the Supreme Court so far as the same may be done without conflict with other provisions of this Constitution."

28. That by Article 4, Section 30, of the State Constitution it is further provided, "In case the General Assembly shall establish other Courts inferior to the Supreme Court the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

29. That by Article 4, Section 31, of the State Constitution it is further provided, "Any Judge of the Supreme Court or of the Superior Court and the presiding officers of such Courts inferior to the Supreme Court as may be established by law may be removed from office for mental or physical inability upon a concurrent resolution of two thirds of both houses of the General Assembly. The Judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon."

30. That the alleged causes of removal set up by the Governor are such as apply to no other Judges or presiding officers of Courts or any other public officers in the State, and the Governor has no power to remove or suspend any other Judge or presiding officer of Courts or any other officer not appointed by him. Wherefore, the defendant says the Statute and the said action of the Governor deprive him of the equal protection of the laws and are in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant expressly claims the protection of said Amendment.

31. That, as appears by section 3 of the complaint, the Governor cited this defendant before him to answer the charges preferred against him. This defendant fully answered, and generally and specifically denied the charges. Thereupon, the defendant demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him. This was refused and no witness or other evidence was produced; and thereafter the Governor made his decision, by which he attempted to remove the defendant till the meeting of the General Assembly, early in January, 1899. The defendant submits that this action was without

a hearing and without evidence to support it, without any trial and without any right of appeal. Wherefore he says the said action deprives him of his liberty and property without due process of law, and is in direct conflict with the Fourteenth Amendment to the Constitution of the United States, and the defendant expressly claims the protection of said Amendment.

32. That he submits to the Court whether, by the action of the Governor aforesaid, the privileges and immunities of defendant as a citizen of the United States have been abridged in violation of the Fourteenth Amendment to the Constitution of the United States, and, if so, he expressly claims the protection of said Amendment.

33. That the defendant is advised that the General Assembly had no power to confer upon the Governor the right of removal or suspension, nor to confer upon itself the power thereafter to pass upon the question of removal or restoration, nor to add to the qualifications for holding office. And the defendant further submits that the matters and things charged against him, and which he fully denies, do not come within the provisions of the Act of the General Assembly and do not warrant the action of the Governor.

34. The defendant submits, being so advised, that the action of the Governor was illegal and void and the defendant is entitled to continue in the exercise of the duties of his office.

Wherefore the defendant prays judgment that he go without day and recover of the plaintiff his costs of action."

The defendant, by leave of the Court, amended section 15 of answer by inserting in lieu of all after the word defendant, in line 3 thereof: "In the year 1891 the defendant sold and conveyed said property to The Carolina Investment Company, a corporation under the laws of this State; and on the 18th day of April, 1893, said company leased it to Stephen Mieusett and Emil Friscard for five years, beginning May 1st

1893, and ending May 1st, 1898, at the following rental: $250.00 per year for the first two years; $300.00 for the third year; $400.00 for the fourth year, and $500.00 for the fifth year, payments to be made quarterly. About the — day of ———, 1893, the said company, wishing to reconvey said property to the defendant, and not having registered its deed, surrendered it to the defendant, and surrendered the property to him, upon the agreement that he would recognize the lease to Mieusett & Friscard. In the fall or winter of 1896 said Mieusett & Friscard abandoned the property and it was leased to Mrs. Mary Wilson about the —— day of January or February, 1897. While Mieusett & Friscard are in arrears for two or three years rent it is perfectly good and collectible, and is now in suit."

The defendant tendered the issues set out in the opinion and demanded a trial by jury.

The Court refused to submit the issues to the jury and the defendant excepted.

The relator moved for judgment upon the pleadings, which motion was granted and the defendant excepted and appealed, upon the assignments of error set out in the opinion.

Messrs. A. C. Avery, Armfield, Turner & Cowles and *W. J. Montgomery*, for plaintiff.

Messrs. R. O. Burton, J. D. Shaw, T. N. Hill, J. C. L. Harris, Armistead Burwell and *John G. Bynum*, for defendant (appellant).

DOUGLAS, J.: This is an action in the nature of *quo warranto*, brought to try the title to the office of Railroad Commissioner. The defendant was suspended by the Governor under the provisions of Section 1 of Chapter 320 of the Laws of 1891, known as The Railroad Commission Act, and the plaintiff appointed to fill the vacancy so created. The part of the Act now under consideration is as follows:

"Said Commissioners shall not be jointly or severally, or in any way be the holder of any stock or bonds, or be the agent or attorney or employee of any such company, or have any interest in any way in any such company, and shall so continue during the term of his office; and in case any Commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same; and in case any Commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the Governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly; and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the Governor shall fill the vacancy, and if the General Assembly shall determine that the Commissioner suspended shall be removed, then the appointee of the Governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended Commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but the Commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly."

The following facts appear from the record: On the 24th day of August, 1897, the Governor wrote to the defendant calling his attention to the said Act, reciting certain allegations as to the defendant's connection with the Southern

Railway Company, and requiring the defendant to show cause in writing on or before the first day of September, 1897, why he should not be suspended from office, and a report thereof made to the next General Assembly.

On the 30th day of August, 1897, the defendant filed with the Governor his written answer, among other defences, denying the power of the Governor to suspend him, and alleging the unconstitutionality of that portion of the Railroad Commission Act authorizing such suspension.

On the 23rd day of September, 1897, the Governor notified the defendant in writing that after due investigation and consideration he was convinced that the defendant had violated the Railroad Commission Law in some of the particulars mentioned in his letter of August 24th and that the defendant had not only violated said Act in the specifications set out in said Act, but that the defendant had otherwise within the meaning and intent and words of said Act become disqualified to act; and that therefore he, the Governor, did suspend the defendant from the office of Railroad Commissioner and Chairman of said Commission, and did appoint thereto the relator, Caldwell.

The defendant on September 24th, replied to the Governor as follows: "Sir:—Yours of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until removed by a tribunal other than a self constituted 'Star Chamber.'" The relator qualified at once, and demanded of the defendant the possession of the said office, together with all its records, which was refused by the defendant.

Thereupon the relator brought this action to recover said office, and filed his complaint, fully setting out his cause of action. The defendant answered alleging that the Governor had no power to suspend him; that if such power existed, the Governor had attempted to exercise it in an arbitrary and unlawful manner, without giving him the fair hearing to which he was entitled by law; that the part of the Railroad Commission Act authorizing such suspension was unconstitutional inasmuch as it imposed additional and unusual qualifications for said office, and interfered with the independent tenure of a judicial officer, and deprived him of his property in said office "without due process of law;" and that his suspension in manner and substance was in violation of the Fourteenth Amendment to the Constitution of the United States. At the conclusion of the reading of the pleadings the defendant tendered the following issues and demanded a trial by jury:

1. Is the plaintiff entitled to the office of Railroad Commissioner?
2. Does the defendant unlawfully intrude into, hold and exercise the office of Railroad Commissioner and Chairman of said Commission?
3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?
4. Has the defendant become disqualified to act as a fair Judge or Commissioner, or has he become in any way disqualified to act?
5. Did the defendant, prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?
6. Did the defendant demand of the Governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?
7. Was said demand refused?
8. Was any evidence produced?

Thereupon the plaintiff moved for judgment upon the complaint and answer. The defendant here claimed that such motion was irregular, and that the plaintiff should either demur or go to trial before the jury. His Honor, then, by consent, heard argument both upon the right to a jury trial and upon said motion for judgment. The defendant's exceptions were as follows: "During the argument the defendant contended, among other things, that the Statute, Laws of North Carolina, Session of 1881, Chapter 320, Section 1, and the action of the Governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore the Statute and said action of the Governor were in violation of the Fourteenth Amendment to the Constitution of the United States, and he expressly claimed the protection of said Amendment. These contentions were disallowed and the defendant excepted. Exception 1.

Exception 2. The Court refused to submit the issues tendered, or any issues, and the defendant excepted.

Exception 3. The Court further ruled that the plaintiff was entitled to judgment upon the pleadings. The defendant excepted.

Exception 4. The defendant moved for a new trial for the foregoing alleged errors. Motion overruled and the defendant excepted."

Thereupon judgment was rendered in favor of the plaintiff relator as follows: "First. That the defendant James W. Wilson has been duly suspended from his office of Railroad Commissioner and Chairman of said Commission, and is unlawfully holding and exercising said office. Second. That the relator, L. C. Caldwell, has been duly appointed to fill the vacancy caused by the suspension of said James W. Wilson from said office. Third. That the defendant James W. Wilson be ousted from said office of Railroad Commissioner and that the relator L. C. Caldwell be inducted into said office and that the relator L. C. Caldwell recover of said defendant and the sureties on his bond the costs of this action to be taxed by the Clerk of this Court." The defendant excepted to this judgment and appealed to this Court.

The first exception cannot be sustained, as we are utterly unable to see any Federal question whatever involved in this action. The office of Railroad Commissioner, from which the defendant has been suspended, is an office existing solely under the Constitution and Laws of this State, and created to administer the Railroad Commission Act. It has no recognition in the Laws of the United States, does not interfere with inter-state commerce, and is concerned solely in domestic affairs and internal trade. The defendant was not deprived of his office without due process of law. He was cited to appear and answer certain charges, and he did appear and filed an answer. The written notice of the Governor, which was admittedly received and acted upon by the defendant, was, in effect, a citation and under the circumstances had all the force of a summons. The only object of a summons is to bring the defendant into Court by giving him legal notice, and if he voluntarily appears, without limiting his appearance, he is held to waive a summons, and is as completely in Court as if it had been served. The Court, or any other tribunal having jurisdiction of the subject matter, has thereafter complete jurisdiction of the person. *Jones* v. *Penland,* 19 N. C., 358; *Hyatt* v. *Tomlin,* 24 N. C., 149; *Duffy* v. *Averitt,* 27 N. C., 455; *Middleton* v. *Duffy,* 73 N. C., 72; *Wheeler* v. *Cobb,* 75 N. C., 21; *Etheridge* v. *Woodley,* 83 N. C., 11; *Penniman* v. *Daniel,* 95 N. C., 341; *Roberts* v. *Allman,* 106 N. C., 391. In *State* v. *Jones,* 88 N. C., 683, 685, this Court has said: "The object of *process* is to give notice and an opportunity to make defence to an action. The *scire facias* furnished this notice, and the sureties submitted to the jurisdiction and resisted the demand for judgment. A defendant may appear without process, and his appearance dispenses with process, since its purpose is to bring him into Court, and he is in Court when he answers and defends the action. That this rule is by no means peculiar to this State will be seen by a reference to the Encyclopedia of Pleading and Practice, Vol. 2, page 639.

What is "due process of law" is generally difficult to define; but we think in the case at bar the defendant has no cause to complain on that score. As the protection of the Constitution of the United States is invoked, we deem it best to omit the numberless authorities in the different State Reports, and confine ourselves on this point to the decisions of that Court, essentially supreme wherever its jurisdiction attaches and where alone the decisions of this Court can ever be called in question.

The case of *Murray's Lessee* v. *The Hoboken Land & Improvement Co.*, 18 How. 272, was an action of ejectment in which the defendant claimed title to certain lands under a sale made by the United States Marshal by virtue of a distress warrant issued by the Solicitor of the Treasury. It was held that such a warrant of distress was not in conflict with the Constitution of the United States, and was "due process of law;" and that the action of the executive power in issuing the warrant was conclusive evidence of the facts recited in it, and of the authority to make a levy—citing *Prigg* v. *Pennsylvania*, 16 Pet. 621; *U. S.* v. *Nourse*, 9 Peters, 8; *Randolph's Case*, 2 Brock., 447; *U. S.* v. *Nourse*, 4 Cranch C. C., 151; *U. S.* v. *Bullock*, (cited 6 Pet. 485.) The Court further says: "Thus, it has been repeatedly decided in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title"—citing *Foley* v. *Harrison*, 15 Howard, 433; *Burgess* v. *Gray*, 16 How., 48. "It is also true that even in a suit between private persons to try a question of private right, the *action of the executive power, upon a matter committed to its determination by the Constitution and laws*, is conclusive"—citing *Luther* v. *Borden*, 7 Howard, 1; *Doe* v. *Braden*, 16 Howard, 635, and cited in *Walker* v. *Sauvinet*, 2 Otto, 93; *Davidson* v. *New Orleans*, 6 Otto, 102; *Springer* v. *U. S.*, 12 Otto, 586, 594; *Ex parte Wall*, 107 U. S., 290; *Hilton* v. *Merritt*, 110 U. S., 107; *Hurtado* v. *Cal.*, 110 U. S., 528, 542.

In the case at bar there can be no question of the right of the Governor to appoint the plaintiff if a vacancy legally existed. *Foster* v. *Kansas*, 112 U. S., 201, 204. The only question really at issue is the legality of the removal of the defendant, and in this view the State of North Carolina is the real party in interest, as it is her act, through her Chief Executive, of which the defendant complains. The State has surely as much interest in having her laws properly administered by officers of her choice, in every respect qualified for their duties, as the general government can have in the collection of its taxes. And we can see no reason why the action of the Governor in suspending the defendant from office in strict accordance with the provisions of a Statute, which we hold to be Constitutional, is not fully as much "due process of law" as was the sale of real estate under the warrant of distress, so held in *Murray* v. *Hoboken*, *supra.* Under the same authority we feel fully justified in holding that the action of the Chief Executive of this State, certainly an officer of higher relative rank and greater dignity than a mere Solicitor of the Treasury, is equally conclusive upon a matter committed to his determination by the Constitution and Laws of this State. It is, at least, of equal dignity with a tax-sale certificate, whose recitals are held to be evidence *prima facie* as to all and conclusive as to many of the facts therein alleged. *De Treville* v. *Smalls*, 98 U. S., 517, 524.

The defendant has not been denied access to the Courts. In fact he did not attempt to appeal from the action of the Governor nor seek the aid of the Courts, but forcibly retained possession of an office from which he had been rightfully suspended, and forced the *plaintiff* to seek redress in this action. The Governor, in his notification of suspension to the defendant, distinctly recognized the right of the defendant to have it legally tested in the Courts, and made no attempt to dispossess him. The plaintiff has sought possession only "by the law of the land" as shown by the bringing of this action.

In *The Bank of Columbia* v. *Okley*, 4 Wheat, 235, it was held that a party may waive his right to trial by jury, by giving a note payable at a bank, the charter of which authorizes collection by summary process. The defendant may well be deemed to have waived his right to a trial by jury, if any such right he ever had, by accepting office under a Statute which expressly provided that he might be suspended by the Governor without reference to a jury.

In *Murray* v. *Hoboken*, *supra*, the Court also held, "That the auditing of the accounts of a receiver of public monies may be, in an enlarged sense, a Judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense, the act of the President in calling out the militia under the Act of 1795 (12 Wheat, 19), or of a Commissioner who makes a certificate for the extradition of a criminal, under a treaty, is Judicial. But it is not sufficient, to bring such matters under the Judicial power, that they involved the exercise of judgment upon law and fact—citing *U. S.* v. *Ferreira*, 13 How. 40.

It may be urged that a distress warrant for the collection of taxes was held to be "due process of law" because such proceeding was in accordance with the common and Statute law of England; but so, also, was the suspension of a public officer.

We see no error in the trial of the action in the Court below, and we affirm its judgment after a full hearing of the defendant's appeal. This much, at least, is "due process of law." *Morley* v. *Lake Shore R. Co.*, 146 U. S., 162.

Due process of law does not necessarily imply in all cases the right of trial by jury. If it did, the equitable jurisdiction of the Federal Courts would practically be annulled. The records of this Court show, what is common knowledge, that, in the recent reorganization of a great railway system, mortgages involving millions of dollars were foreclosed in the Circuit Court of the United States, and the stockholders deprived of every vestige of their property, without any suggestion of a jury.

In *Walker* v. *Sauvinet*, 92 U. S., 90, the Court (Waite, C. J.) says: "*All questions arising under the Constitution of the State alone are finally settled by the judgment below.* We can consider only such as grow out of the Constitution of the United States. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the States is regulated by the *law of the State*." In *Leeper* v. *Texas*, 139 U. S., 462, 467, it was held, "That whether Statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States,"—citing *South Ottawa* v. *Perkins*, 94 U. S., 260, 268; *Post* v. *Supervisors*, 105 U. S., 667; *Norton* v. *Shelby County*, 118 U. S., 425, 440; *Railroad Co.* v. *Georgia*, 98 U. S., 359, 366; *Baldwin* v. *Kansas*, 129 U. S., 52, 57; and "that law in its regular course of administration through Court of Justice is due process, and when secured by the law of the State the Constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice;" citing *Hurtado* v. *Cal.*, 110 U. S., 516, 535; *In Re Kemmler*, 136 U. S., 436, 449; *Caldwell* v. *Texas*, 137 U. S., 692. See also *Giozza* v. *Tierman*, 148 U. S., 657; *Duncan* v. *Mo.*, 152 U. S.. 377; *Missouri, &c., R. Co.* v. *Mackey*, 127 U. S., 205; *Railroad Co.* v. *Herrick*, 127 U. S., 210; *State* v. *Muse*, 20 N. C., 319; *State* v. *Chambers*, 93 N. C., 600; *State* v. *Moore*, 104 N. C., 714.

In *Hurtado* v. *Cal.*, *supra*, in which the meaning of the phrase "due process of law" is elaborately discussed, it was held that the words "due process of law" in the 14th Amendment to the Constitution do not necessarily require an indictment by the grand jury in a prosecution by a State for murder; and that a conviction upon an information for murder in the first degree, and a sentence of death thereon, was not without due process of law and was, therefore, not in violation of the Constitutional provision. *McNulty* v. *Cal.*, 149 U. S., 645; *Vincent* v. *Cal.*, Ibid, 648.

In *Munn* v. *Illinois*, 94 U. S., 113, 134, the Chief Justice delivering the opinion of the Court, says: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property, which have been created by the common law can not be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the Legislature, unless prevented by Constitutional limitations. Indeed, the great office of Statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In *Davidson* v. *New Orleans*, 96 U. S. 97, 105, Justice Miller, for the Court, says that "it is difficult if not impossible to frame a definition of the Constitutional phrase 'without due process of law,' at once perspicuous, comprehensive and satisfactory," but that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a Court of Justice, according to the modes of proceeding applicable to such case." And, citing, *Murray* v. *Hoboken*, *supra*, he further says: "An exhaustive Judicial inquiry into the meaning of the words 'due process of law,' as found in the Fifth Amendment, resulted in the unanimous decision of this Court that they do not *necessarily* imply a regular proceeding in a Court of Justice, or after the manner of such Courts."

The origin, intent and scope of the Thirteenth and Fourteenth Amendments to the Constitution of the United States are fully and ably discussed in the *Slaughter House Cases*, 16 Wallace, 36, but, as no reasonable extract would do justice to the opinion, it can properly be cited only as a whole.

In *Missouri* v. *Lewis*, 101 U. S., 22, 31, it is said that "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of Judicial proceeding."

In *Ex Parte Wall*, 107 U. S., 265, a rule was served upon the petitioner, by the United States District Judge, without any previous affidavit and upon mere hearsay information, to show cause why he should not be disbarred from practicing as an attorney for taking part in a lynching. The respondent filed a written answer denying the charge, and excepting to the jurisdiction of the Court. After the examination of one witness and hearing the argument of counsel, the Court overruled the exceptions and made an order prohibiting the respondent from practicing at the bar of said Court, until a further order. On petition for *mandamus* it was held that the proceeding was regular and was due process of law, and that it was not a *criminal* proceeding, and not intended for punishment, but to protect the Court from the official ministration of persons unfit to practice as attorneys therein. The proceeding in that case was certainly much more summary and less regular than in the case at bar, while the avowed object was the same. The defendant herein was not suspended by the Governor as a punishment for any crime, as he was not charged with crime, but simply with a legal disqualification. The object of his suspension, pending a Legislative determination, was to prevent the danger and scandal of having important official duties performed by one legally disqualified. The Railroad Commission was constituted by the Legislature in obedience to a strong popular demand, and the people have a right to require that the men, charged with the grave duty of deciding between them and the great transportation companies which practically control the commerce of the country, should be absolutely free from the slightest suspicion of interest or bias. Such a requirement is based upon the highest principle of public policy, and is no more unreasonable than to say that a Clerk or Sheriff must give bond for the faithful performance of his duties, that an executor or trustee cannot buy at his own sale, and that a Judge shall not sit in his own case.

Such provisions are not uncommon. A remarkable instance may be found in the Act of August 13, 1888, (25 Statutes at Large, U. S., 433), which reads as follows: "Section 7. That no person related to any Justice or Judge of any Court of the United States by affinity or consanguinity within the degree of first cousin shall *hereafter* be appointed by such Court or Judge to or employed by such Court or Judge in any office or duty in any Court of which such Justice or Judge may be a member."

It is no crime to be related to a Judge of the United States; nor can it be any reflection upon the personal character of such relative and, yet, it is made by law an absolute disqualification for office.

The object of the law is clearly not to punish one who has committed no offence but to relieve the Judges from any temptation to appoint incompetent officials, and to secure to the people in the selection of their agents the best judgment of the Courts.

As to the equal protection of the laws guaranteed by the Constitution of the United States, it is well settled that special legislation is not objectionable where it is made to apply equally and without unjust discrimination to all who may be affected by it. The Fourteenth Amendment does not prohibit legislation limited as to objects or territory, but merely that all persons subjected to it shall be treated alike under like circumstances and conditions. *Hayes* v. *Missouri*, 120 U. S., 68; *Railroad Co.* v. *Mackey*, 127 U. S., 205; *Lowe* v. *Kansas*, 163 U. S., 81, 88.

In *Walston* v. *Nevin*, 128 U. S., 578, 582, the Court says: "And wherever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied;" citing *Wurts* v. *Hoagland*, 114 U. S., 606; *Railroad Co.* v. *Richmond*, 96 U. S., 521, 529. "The remedy for abuse is in the State Courts, for, in the language of Mr. Justice Field in *Mobile* v. *Kimball*, "this Court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation."

In *Giazza* v. *Tiernan*, 148 U. S., 657, 651, the Court says: "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the Legislature of a State except those imposed by its written Constitution."

In *Duncan* v. *Missouri*, 152 U. S., 377, it was held that the privileges and immunities of citizens of the United States protected by the Fourteenth Amendment, are such privileges and immunities as arise out of the nature and essential character of the Federal Government, and are granted or secured by the Constitution of the United States. Miller on the Constitution, 662; *Presser* v. *Illinois*, 116 U. S., 252.

In the case of *Kennard* v. *Louisiana*, 92 U. S., 480, the plaintiff in error was summarily removed from the office of Associate Justice of the Supreme Court of Louisiana, its Court of last resort, by a mere rule of Court. The plaintiff took out a writ of error, asserting that he was deprived of his office without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. The opinion of the Court, delivered by Chief Justice Waite, without dissent, and remarkable equally for its clear exposition of the law and admirable condensation, affirmed the judgment, for the following reasons: "The question before us is, not whether the Courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State Courts. *Our authority does not extend beyond an examination of the power of the Courts below to proceed at all.* . . . . It will thus be seen that the Act relates specially to the Judges of the Courts of the State, and to the internal regulations of a State in respect to its own officers. . . . . He had an opportunity to be heard before he could be condemned. This was "process," and, when served, it was sufficient to bring the incumbent into Court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in *some form* brought to the attention of Kennard, for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the Court adjudged otherwise. He then made known his title to the office; in other words he showed cause why he refused to vacate. This was, in effect that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived. Upon this he asked a *trial by jury.* This the Court *refused*, and *properly*, because the law under which the proceedings were had provided in terms that there should be no such trial. . . . . A mere statement of the facts carries with it a complete answer to all the Constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be *enforced* by means of orderly proceedings in a Court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but *he was in fact heard*, both in the Court in which the proceedings were originally instituted, and, upon his appeal, in the highest Court of the State."

I have italicised the words peculiarly operating upon the case at bar. If an Inferior Court of the State of Louisiana can, by virtue of a Statute of that State, upon a mere rule issued upon a *prima facie* case created by said Statute, *remove* from office a Justice of its highest Constitutional Court, we cannot see why the Chief Executive of this State, acting under express authority of a Statute, and in strict accordance with its terms cannot *suspend* a member of an inferior administrative Court. At least such action affects only the internal policy of North Carolina when dealing with its own officers, and should be judged by its Constitution and laws alone.

We have fully considered the first exception, not only from its Federal relation, but also from its important bearing upon the validity of the Act under our own Constitution, which provides that: "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, *but by the law of the land.*" Therefore, if we were of opinion that the defendant had been deprived of his property in the office "without due process of law," that is, such process as is due to the peculiar circumstances of his case by the law of the land, it would be our duty to at once reverse the judgment of the Court below. In going over the ground covered by this exception, we have necessarily been compelled to say much that is applicable to the other exceptions, and which will not be repeated.

The second exception to the refusal of the Court to submit the issues tendered, or any issues, is practically directed to the denial of a trial by jury. This we think, was properly refused, as there were no disputed facts before the Court. It is not denied that the Governor notified the defendant to appear and answer; that the defendant did so appear and answer; that the Governor subsequently suspended the defendant, giving him written notice of said action, and appointed the relator; that the relator duly qualified, demanded possession of the office, was refused by the defendant, and brought suit.

There was absolutely nothing to go to the jury unless the Court went behind the action of the Governor, which we think could not be reviewed by the Court. The suspension by the Governor is not a final determination of the defendant's rights, which must ultimately be passed on by the Legislature, sitting somewhat in the nature of a Court of Impeachment. If it should determine that the defendant had been suspended without just cause, he would be at once reinstated, and be entitled to his full pay from the time of his suspension. The duty of suspension was imposed upon the Governor from the highest motives of public policy, to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the Legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the Governor was therefore by the very letter and spirit of the law required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the Governor would have no power to direct an issue, like a Chancellor.

Section 19 of Article I of our Constitution provides that:

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable." And yet from the remotest times it has been held that this right did not apply to equitable proceedings, and that in the determination of many matters of fact the intervention of a jury was neither necessary nor possible. Take for instance, applications for receivers, injunctions and proceedings in contempt. Even in actions at law, there are many matters of fact that must be found by the Court below, and which are not even reviewable in this Court. Every time a Judge below takes the case from the jury and directs a verdict he practically deprives the party of a trial by jury; and yet that he can so direct a verdict against the party on whom rests the *onus*, when there is nothing more than a scintilla of evidence, has been held in a long line of decisions in this Court from *Wittkowsky* v. *Wasson*, 71 N. C., 451, down to *Spruill* v. *Insurance Co.*, 120 N. C., 141, and several cases at this term.

In *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447, 488, the Court says: "Another suggestion . . . . . is that the defendants are not accorded a right of trial by jury. . . . . The issue presented is not one of fact but of law exclusively. In such a case the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him as an officer to perform a ministerial duty." Any right of trial by jury which the defendant might have had under other circumstances, if any, would be taken as having been waived by his acceptance of an office under a Statute providing for summary suspension. That a jury trial may be waived by either written or oral consent, or even by a failure to appear, is expressly provided by Section 416 of *The Code*. It is also held to be waived by a consent reference. Clark's Code, p. 400 and cases cited. In England it is regarded as a prerogative of the Crown by letters patent to suspend a public officer, although the office was granted for life. Throop on Public Officers, Section 401; *Slingsby's Case*, 3 Swanst, 178. The only recognition of this rule in America seems to be that involved in the maxim that the power of appointment includes by implication that of removal, the application of which is necessarily limited by Constitutional or Statutory provision. The maxim cannot apply in this case, because the Governor did not originally appoint and has suspended the defendant under express Statutory authority. It comes rather under the generally recognized rule that, in the absence of any *constitutional* restriction expressed or necessarily implied on the power of the Legislature, it may provide by Statute for the suspension of a public officer, by some other officer or board. Throop, *supra*, Section 402; Mechem on Public Officers, Section 463; *Butler* v. *Penn.*, 10 Howard, 402. With the exception of this State, it is the well settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties, or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges before the end of the term, or to alter or abridge the term, or to abolish the office itself. Throop, *supra*, Section 19, citing 92 decisions from the United States Supreme Court and 32 different States; also Black Const. Law, p. 530, and cased cited. Mechem, *supra*, Section 463 and 464, citing numerous cases, says that, except in North Carolina, it is well settled that there is no contract, either express or implied, between a public officer and the government whose agent he is; nor can public office be regarded as the property of the incumbent. In *Connor* v. *N. Y.*, 2 Sandford, 355, Ruggles, C. J., says: "Public offices are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office holder."

The celebrated case of *Hoke* v. *Henderson*, 15 N. C., 1, recognizes to a great extent the same principle. While deciding in favor of the defendant on the ground that an office is the property of the incumbent by mutual contract, and that the unconstitutional provision was not that of a law *prescribing* a rule of property, or modifying the extent of interest or the tenure *prospectively*, but interfered with *vested* rights, Chief Justice Ruffin (page 17) says: "That the purpose of creating public offices is the common good, is not doubted. Hence, most of the rules regulating them have a reference to the discharge of their duties and the promotion of the public convenience; they are *pro commodo populi*. Hence they are *not* the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. *They are only the subjects of property, as far as they can be so in safety to the general interest, involved in the discharge of their duties.*" This Court has recently had occasion to reaffirm the doctrine laid down in that oft quoted decision, which has become too firmly established in the policy of our laws now to be questioned; but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest ligitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried, and least of all that its most extreme construction would be invoked to bring the tenure of high official positions within the operation of an amendment to the Federal constitution primarily adopted for the protection of the colored race. See the opinion of Justice Miller in the *Slaughter House Cases*, 16 Wall. 36.

But our decision in the case at bar does not conflict with that in *Hoke* v. *Henderson*. The Statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of the Act originally creating the office of Railroad Commissioner, it "*prescribes*" a rule of property in said office, and modifies the extent of interest and tenure therein "*prospectively*." The defendant, taking under the Act, holds subject to the Act; and relying upon his contract is bound by all its provisions. One of its express provisions was the reserved right of the Legislature to remove, and the power and duty of the Governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office. *Bunting* v. *Gales*, 77 N. C. 283; *McCless* v. *Meekins*, 117 N. C., 34; *McDonald* v. *Morrow*, 119 N. C., 666; *Ward* v. *Elizabeth City*, 121 N. C.; 27 S. E. Reporter, 993; *Koonce* v. *Russell*, 103 N. C., 179; *Hutchins* v. *Town of Durham*, 118 N. C., 457; Cooley's Const. Limitations, 285. It was held in *Head* v. *University of Missouri*, 19 Wallace, 526, that where one was elected a professor in a State University for six years "subject to law," "this expression meant subject to whatever law the State Legislature might see fit to pass. It was a part of the contract that the Legislature could, at its discretion and in its pleasure, bring it to an earlier end." In *Ewart* v. *Jones*, 116 N. C., 570, which was an action in the nature of a *quo warranto* heard upon a case agreed *without* a jury, this Court in seating the relator, held that under our present Constitution the Legislature had the power, in establishing the office of Judge of the Criminal Court, to prescribe its powers, jurisdiction and methods of appointment and removal, and to *elect the incumbent.* Chief Justice FAIRCLOTH, in delivering the opinion of the Court says: "Under our form of government the sovereign power resides with the people, and is exercised by their Representatives in the General Assembly. The only limitation upon this power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time." If the Legislature can thus elect a Judge of the Criminal Court and provide for the manner of his removal, why can it not also elect a Railroad Commissioner, and in the creative act reserve to itself the right to remove and to the Governor the power of suspension. Two higher agencies could not be found, one peculiarly representing the will of the people, and the other the Chief Executive of the State to whom is committed by the Constitution itself "the supreme executive power of the State" and who is expressly enjoined "to take care that the laws be faithfully executed." But it is urged that the Legislature has exceeded its constitutional power in reserving the right of removal. We think not, where the office is purely of legislative origin and administrative duties.

It is alleged that the Statute is unconstitutional because it requires of the Railroad Commissioners qualifications in addition to those prescribed in the Constitution. We see no merit in this contention, as such provisions were not intended to restrict the rights of the individual, but to secure the faithful and efficient performance of public duties. *Hargrove* v. *Dunn*, 73 N. C., 395; *Commissioners* v. *Plaisted*, 148 Mass. 375; *Rogers* v. *Buffalo*, 123 N. Y., 173, 181; Throop on Public Officers, Section 73, 74.

Moreover, every presumption is in favor of the constitutionality of an Act of the Legislature, and all reasonable doubts should be solved in its favor. Cooley on Const. Lim., page 220, and cases therein cited; Black's Const. Law, Section 30 and cited cases.

While our attention has not been called to any decision from other jurisdictions relating to the removal or suspension of Railroad Commissioners, we do find in the creative Statutes of the United States and of several of the States, provisions similar to those now under consideration. The same presumption of constitutionality would attach to them, and thus far they may be considered as precedents. Another constitutional objection to the Act has been argued with great force, and has received our most careful and serious consideration. That objection is that the Act interferes with the independent tenure of the Judiciary so essential to the proper enforcement of the law and the protection of the citizen. This Commission was compared to the Criminal Courts of the State; and the danger of placing the lives and liberties of the people in the keeping of Judges whose official tenure might depend upon the uncertain complexion of the Legislature or the arbitrary will of the Governor, was ably and eloquently portrayed.

We realize the responsibilities of this Court in settling the line of demarkation between the legislative, executive and supreme judicial powers, which, by constitutional obligation, must be kept forever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line, we will put them back where they belong; but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion but of law, a matter not of expediency but of right.

Our conclusion is that the Railroad Commission does not stand upon the same footing as the Criminal Courts, inasmuch as it is an *administrative* and not a *Judicial* Court. While it was made by a subsequent Statute a court of record, it was clearly the object of the Act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers.

It has been held to be a court of record in *Express Co.* v. *Railroad,* 111 N. C., 463, 474, but in the opinion of the Court delivered by Chief Justice Shepherd appears the significient qualification, "Whether a Court, having no power to enforce its judgment, fulfills the definition of a court of record and of general jurisdiction is *unnecessary to be considered.*" The Supreme Court of the United States in *Reagan* v. *Farmer's Loan & Trust Co.*, 154 U. S., 362, 397, citing the *Railroad Commissioner cases,* 116 U. S., 307, says: "There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by Railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a Commission is merely an *administrative* board created by the State for carrying into effect the will of the State as expressed by its Legislature."

Upon the foregoing authorities we are of opinion that the disputed provisions of the Act are constitutional, and that the power of suspension rests in the hands of the Governor, which, when exercised in an orderly manner, is not reviewable by the Courts. Whether the action of the Governor was justified by the facts, which he alone could find, is not for us to say. That the defendant has not been deprived of his property without due process of law; that the only property he could have in the office was that given to him by the Statute, which must be construed in all its parts. His Commission, which is his title deed, appears to us with the fateful words of the creative

Act written across its face by the hand of the law. Whatever right to a trial by jury he might otherwise have had, was waived by his acceptance of the office under the conditions of the Statute, at least so far as the action of the Governor was concerned. In the Court below, as all the material facts that could there be inquired into were practically admitted, there was nothing left but the bare questions of law, and upon those questions we see no error in the ruling of the Court. The judgment must therefore be affirmed, but in view of the public interests involved, we deem it proper, not to remand the case, but to enter final judgment in this Court. This action is taken on motion of counsel made without objection in open Court upon the hearing of the case, and under authority of Section 957 of *The Code*, as recognized in *Bernhardt* v. *Brown*, 118 N. C., 700, 710. Judgment will therefore be entered that the relator is entitled to the office of Railroad Commissioner and Chairman of said Commission; that the defendant is not entitled thereto and shall be ousted therefrom, and that the relator be placed into possession of said office, together with all its records and other appurtenances thereunto belonging.

Affirmed.

The judgment in the foregoing case was as follows:

"This cause coming on to be heard in the Supreme Court and having been decided in favor of the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of Railroad Commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from, and the relator inducted into said office of Railroad Commissioner.

Therefore, let a writ issue out of this Court directed to the Sheriff or other lawful officer of Wake County, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the Railroad Commissioners, in the Agricultural Building on Edenton Street in Raleigh, and known as the Railroad Commission offices, together with all property, papers and effects appertaining or belonging to said offices.

4. That the plaintiff relator recover the costs of this action to be taxed by the Clerk of this Court.

(Signed) WALTER CLARK,
Justice Supreme Court."

FAIRCLOTH, C. J., dissenting: As I do not agree with the majority of the Court in this case, I feel it my duty to state why I do not. I concede the right of the Legislature to abolish any office of its own creation, in which event the officer goes with the office, not upon any notion of implied notice in the acceptance, but because the Legislature has the power to abolish. By the Act of 1891, Chapter 320, the Legislature created the office of a Railroad Commission with the powers and duties therein enumerated, and elected the members of the Commission, the term of office being six years. That said Commission is a Court of Record with the powers and jurisdiction of a Court of general jurisdiction, to the extent of all subjects embraced in said Act, is settled. *Express Co.* v. *Railroad*, 111 N. C., 463; *Railroad* v. *Telegraph Co.* 113 N. C., 213; *Leavell* v. *Telegraph Co.*, 116 N. C., 211. That an office is property has been uniformly held since 1833. *Hoke* v. *Henderson*, 15 N. C., 1. Section 1 of said Act provides: "Said Commissioners shall not jointly, or severally, or in any way be the holder of any stock or bonds, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any Commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same; and in case any Commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the Governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the Governor shall fill the vacancy, and, if the General Assembly shall determine that the Commissioner suspended shall be removed, then the appointee of the Governor shall hold until his successor is elected and qualified as hereinbefore provided, &c."

Thus we see that the Governor *suspends* whenever he deems proper and the Legislature *removes* at its will and pleasure, as an *ex parte* proceeding, the officer (commissioner) having no opportunity to be heard. This proceeding is at least a novelty and so far as I remember is without precedent, certainly so in North Carolina. Such proceedings no doubt are found under some forms of government, but they are at variance with all fundamental rules of government in the United States of America. Those rules protect life, liberty and property in the due administration of law.

My conception is that the act of the Governor in suspending the defendant was not an executive function, but simply the act of an agent of the Legislature with such power as they attempted to confer on their agent, and that the term "Governor" was simply used to identify the agent. I can see no reason why the Secretary of State could not as well have been the agent, with directions, for the causes mentioned in the Act, to suspend the Governor from his office until the Legislature should have an opportunity to remove or restore him, as they might choose to do, without any hearing for him. If this can be done for the causes specified in Section 1 of the

Act, then other like causes might be added. Let us then suppose that the Legislature in addition, had said "if the Governor shall own any stock in any railroad in this State, or shall receive any benefit, convenience or accommodation from any railroad, then the Secretary of State shall suspend him from office, and report his Act to the next Legislature, and that they will remove or restore him, as seems good to them." It seems to me that such action would be in derogation of his rights under Article III, Section 12 and Article IV, Section 3 and 4 of the Constitution, providing for his conviction, removal and disqualification for office. It is true that he is a constitutional officer, and so is the defendant, under the authority of Article IV, Section 2.

So, the real question is the power of the Legislature to suspend and remove a judicial officer from his office and thus forfeit his property without giving him a trial.

Under our form of government the source of all power is the people. At the outset they declared their will in the Constitution and adopted by common consent, general rules for governing themselves, known as the law of the land, and each Department, with its many sub-divisions, is subordinate to those fundamental principles. The Constitution is a brief and condensed expression of law and must be taken as expressed, with all of its reasonable implications· Among its utterances we find: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." Article I, Section 8.

"The Executive Department shall consist of a Governor, in whom shall be vested the Supreme Executive power of the State," &c. Article III, Section 1.

"The judicial power of the State shall be vested in a Court for the trial of impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace and such other Courts inferior to the Supreme Court, as may be established by law." Article IV, Section 2.

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government." Article IV, Section 12. And this article provides further that the Legislature may distribute the power and jurisdiction, provide for appeals, and regulate the method of proceeding, as it may deem best, "so far as the same may be done without conflict with other provisions of this Constitution." "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty, or *property*, but by the law of the land." Article I, Section 17.

"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Article I, Section 19.

The terms "due process of law" and "the law of the land" when the rights of property are under consideration, are not easily distinguished. I have seen no better definition of the latter than that given by Mr. Webster in *Dartmouth College* v. *Woodward*, 4 Wheat, 519, (Works of Webster Vol. V, p. 487). "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the Legislature. There would be no general permanent law for Courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

A glance at the above recitals would seem to answer, without further argument, the question "Has the Legislature the power, directly or indirectly, to suspend or remove a judicial officer, and declare his right and property in his office forfeited?"

It has been universally held in this country, wherever *freemen* live, that no forfeiture of an office nor vacancy therein can be judicially declared, until the accused has had a trial and sufficient cause is established. *Hoke* v. *Henderson*, 15 N. C., 1; *People* v. *Heaton*, 77 N. C., 18; *Vann* v. *Pipkin*, 77 N. C., 408; *State* v. *Norman*, 82 N. C., 687.

"The term 'law of the land' does not mean merely an act of the General Assembly. If it did every restriction upon the legislative authority would be at once abrogated." *Hoke* v. *Henderson*, *supra*.

Suppose the General Assembly at its next meeting shall examine the Governor's report and, finding no sufficient cause, shall *adjudge* that defendant was not duly suspended and that he has not forfeited his office, and the plaintiff shall refuse to surrender his possession of the office; what then? With these conflicting decisions, to what tribunal can the parties appeal for a finality? Any legislative Act that *can* lead to such a result must be a nullity. Any legislative sentence declaring a forfeiture of property is judicial in its nature and, when rendered without a hearing and trial, is in the nature of things void. The Constitutionality of an Act is determined by its effect, rather than the intent of the Legislature. *Bank Tax Case*, 2 Wallace, 200; *Provident Insurance Co.* v. *Massachusetts*, 6 Wallace, 611. It may be competent, as I have said, to abolish an office, when the property therein is necessarily lost, but it is quite a different proposition to continue the office, discharge the officer at pleasure, and give his office to another. I am told that every office is accepted with notice that the officer may be displaced or removed. That is not an express condition, but at most is only an implied condition, and it is equally implied that such removal, when personal and property rights have vested, can be made, only after *cause* established, by a Court having jurisdiction and by proceedings recognized by the general and fundamental rules of law and by judicial authority. Conditions precedent may bar an entry, but a condition subsequent, even if it be illegal or immoral, cannot divest an estate. A subsequent condition is not self-executing, and when invoked for the purpose of convicting and declaring a forfeiture, it becomes effective only under the rule and the manner above stated.

There is no allegation of incompetency, bad faith or *mal*-administration against the defendant in the discharge of his duties in office. The matters preferred by the Governor in his suspending order, rather vaguely stated and based upon private information and newspaper reports, are inserted in the complaint and substantially constitute the complaint. The defendant specifically denies each material allegation. When brought before the Superior Court under the form of a trial, the defendant demanded to hear the proof of the matters alleged, to confront his accusers, to cross-examine, to introduce his own evidence, and to have the issues determined by a jury of his peers. These requests were all refused by the Court and judgment was pronounced declaring that defendant had been duly suspended from his office, and ordering his ouster therefrom. This Court is now appealed to, to affirm said judgment and approve the procedure below in this case.

Without exhausting the argument, my excuse for tediousness is the importance of this question. I think the plaintiff's contention is injurious, subversive and contrary to the organic law of our system of government, and that it is unreasonable and unjust, and that the decisions of any Court in any State, disregarding those principles, must soon fall under the condemnation of the legal mind in this country.

State ex rel L. C. CALDWELL v. J. W. WILSON.

Practice—Motion to Recall Execution Issued from this Court—Motion to Set Aside Writ of Supersedeas Issued by Supreme Court of United States.

1. This Court has no power to set aside or to pass upon the regularity of a writ of *supersedeas* issued by the Supreme Court of the United States.
2. In an action in the nature of *quo warranto* to try the title of an office to which the relator had been appointed and had qualified, the judgment of this Court in his favor immediately upon its being filed, and *ex proprio vigore*, placed the relator in possession of the office with the right to exercise its duties and draw the salary attached thereto from the time of his appointment, and no process of this Court was necessary for that purpose.
3. In such case, the judgment of this Court, having taken effect immediately, is not superseded by a writ of error from the United States Supreme Court, whether regular or irregular.
4. Though an execution issued from this Court was unnecessary to give effect to such judgment by placing the relator in possession of the office, it will not be recalled on motion of the defendant.

The opinion and judgment in the case of *Caldwell* v. *Wilson* (*ante*) were handed down on December 23, 1897, at

4:30 p. m. and at 5:30 p. m. on December 23, the plaintiff, through his counsel, William H. Day, obtained a writ of execution, directed to the Sheriff of Wake County in the following words:

"The State of North Carolina to the Sheriff of Wake County, Greeting:

Whereas in the above entitled cause it was adjudged at this Term that the defendant wrongfully withholds possession of the office of Railroad Commissioner from the plaintiff relator, and that plaintiff relator is entitled to the possession of the same, these are therefore to command you forthwith to put the relator in possession of the rooms occupied as offices of the Railroad Commissioners, in the Agricultural building on Edenton Street, and known as the Railroad Commission Offices, together with all property, papers and effects appertaining or belonging to said offices, and to oust the defendant from said office and to induct the plaintiff's relator into the same, and you shall make due return thereof on the first day of the next Term of this Court."

At 7:10 p. m., December 23, the defendant filed writ of error and bond, &c., to Supreme Court of the United States, with copies of the writ for the State of North Carolina, and for relator.

Upon the opening of the Court on December 24 the following proceedings were had:

The plaintiff, through his counsel, William H. Day, moved (orally) in open Court to set aside the *supersedeas* proceedings or adjudge them irregular. And the counsel for the defendant submitted the following motion:

To the Honorable, the Supreme Court of North Carolina: The defendant respectfully shows to the Court that the judgment herein was rendered in the afternoon of Thursday, December 23, 1897; that execution thereon was issued by the Clerk of this Court to the Sheriff of Wake County about

5:30 o'clock p. m. on the same day, but has not been executed; that the defendant's counsel sued out a writ of error to the Supreme Court of the United States, which was duly issued by the Clerk of the United States Circuit Court for the Eastern District of North Carolina, and was allowed by the Chief Justice of this Court on the same day; that the defendant also gave a good and sufficient bond in a penal sum fixed by his Honor, the Chief Justice, conditioned as a *supersedeas* bond, who duly approved said bond and signed the citation; that at 7:10 o'clock p. m. the defendant's counsel filed said writ of error and bond in the Clerk's office of this Court, and at the same time lodged therein a copy of said writ of error for the State of North Carolina, and a copy for L. C. Caldwell. The defendant submits to the Court that the judgment of the Court is superseded and he respectfully asks that the said execution be recalled.

R. O. BURTON,
SPIER WHITAKER, for defendant.

This 24th December, 1897.

On the same day, December 24, the following opinion was handed down:

CLARK, J.: This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms and other tangible property belonging to the Railroad Commission. The relator moved to set aside the *supersedeas* proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this Court *ex proprio vigore* placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached, from the date of his appointment. The judgment took effect immediately upon being filed, and is not superseded by the subsequent writ of error, regular or irregular. *Foster* v. *Kansas*, 112 U. S., 201. The relator being in office by virtue of the judgment of this Court, any attempt by the defendant to exercise its functions, or to interfere with the full and free exercise thereof by the relator, and any attempt by any one else to interfere by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this Court, will be a contempt of this Court. We decline to make any order recalling the execution. Both motions refused.

State ex rel J. H. PEARSON v. S. OTHO WILSON.

[For Syllabus see State ex rel Caldwell v. Wilson, (*ante*). page 425.]

ACTION in nature of *quo warranto* to try the title to the office of Railroad Commission, tried before *Robinson*, *J.*, at October Term, 1897, of WAKE Superior Court. From a judgment for the plaintiff the defendant appealed.

Messrs. MacRae & Day and *A. C. Avery*, for plaintiff.

Messrs. R. O. Burton, *Spier Whitaker* and *J. C. L. Harris*, for defendant (appellant).

DOUGLAS, J.: The facts in this case are substantially similar to those in *Caldwell* v. *Wilson*, and the questions of law are identical. For the reasons given in that case, the judgment in this case, in the Court below, is affirmed, and judgment will be entered here that the relator Pearson is entitled to the office of Railroad Commissioner now held by the defendant Wilson; that the defendant is not entitled thereto, and that he be ousted therefrom, and that the relator Pearson be placed in the possession of said office, with all its records and appurtenances thereunto rightfully belonging.

Affirmed.

JOHN H. WHITE v. SUFFOLK & CAROLINA RAILROAD COMPANY.

Trial—Instructions—Directing Verdict—Province of Jury.

1. The Court can never find or direct an affirmative finding of the jury but may direct a negative finding when there is no evidence, or no such evidence as should be allowed to go to the jury, tending to establish the affirmative of the issue.
2. Where, in the trial of an action for damages caused by defendant's negligence, there is no evidence tending to prove contributory negligence, the Court may instruct the jury that there was no contributory negligence.

ACTION for damages for injuries caused by the negligence of defendant, tried at Spring Term, 1897, of CHOWAN Superior Court before *Bryan, J.*, and a jury. The defendant set up as a defence the contributory negligence of the plaintiff. The testimony was as follows:

G. H. White testified:

"Am son of plaintiff. Accident occurred at Corapeake station Monday, February 17, 1896, at 7:30 o'clock p. m.; I was with him. Brinkley, Section Master, and I were the only persons present. My father was going to Chowan station; he lives eight miles from that station. Plaintiff bought his ticket in Jones' store; train blew. We stayed on Brinkley's platform till train got up to freight house; ticket agent said that train would not come up to station, must walk to it; then we all three started to train by regular route from ticket office, as directed by ticket agent. When we got to station, passenger coach was stopped north of freight house, which was in same building with waiting-room and station. The train was bound south; it had stopped at time of accident. When we got to corner of waiting-room, there was a switch between main track and waiting-room. C. Brinkley went ahead, plaintiff next; planks were across the path, and we had to go over them to get to coach, and there my father fell, not knowing they were there; two planks were there and he ran right against them and fell whole length on his stomach. There were no lights anywhere about there, except at ticket office and in car; it was dark, and snowing as fast as I ever saw it. We had just passed waiting-room; four or five feet to planks, and from planks to the coach fifteen or twenty feet; one end of planks on platform, other on switch near the walk; planks running across the path in which we were walking. Plaintiff got aboard coach after falling. Train was in motion when I got off. Train didn't stop opposite waiting-room that night. From freight house to switch nearer than a foot; between side-track and switch very close. Planks were used to roll freight from cars to house; one end of plank on platform (elevated) and other against iron on main track on the ground, most of time planks on platform. I saw them drop planks down Saturday night; planks were a long distance from the engine. Jones and Brinkley live nearest to platform. At time of fall we were two feet or three feet from platform; plaintiff fell on switch; was walking on switch, he got up himself. Stayed with C. Brinkley night before and at my wife's father's the day of accident. My father was carrying an umbrella. Brinkley was with him."

Plaintiff testified in his own behalf:

"Accident occurred at Corapeake station. I bought ticket and was standing on Brinkley's piazza, and went from there to cars; we were all together. I didn't know planks were there, and fell over them; got up and went to train; didn't see planks. I spent Sunday at C. Brinkley's house. Started from Brinkley's store; he went along to show me the way; as we got to planks, I followed him, he stepped a little aside and over the lower end of the planks; I went right along in usual route used by passengers, but fell and got hurt. Brinkley didn't tell me to "look out," "not to go ahead," "not to fall over the planks." Brinkley and I were walking under an umbrella, I lowered it just before we got to the planks. There was no light of any kind so that we could see the planks. It was so dark I could see nothing."

There was no exception to the evidence concerning the question of damage.

There was no evidence bearing on the question of contributory negligence, except that set out above.

Defendant introduced no evidence at close of plaintiff's evidence, and consented that first issue be answered "Yes."

The defendant in apt time requested the Court to charge the jury as follows:

"It being admitted that it was dark and stormy at the time of the accident, it was the duty of the plaintiff to act with more than usual caution, and if he failed to use greater than ordinary caution and such failure contributed to the accident, the jury should answer the second issue "Yes." "

(This the Court refused to give, and defendant excepted.)

"2. If the plaintiff, being a stranger and not knowing the way to the train and the night being dark and stormy, left the store of J. Brinkley, C. Brinkley going with him to show him the way, it was his duty to follow and be guided by said C. Brinkley; and if he failed to do so and such failure contributed to the injury he received, the jury should answer the second issue "Yes." " (This was refused. Defendant excepted.)

"3. The plaintiff, being a stranger and not knowing the route to the train, and it being dark and stormy, C. Brinkley being with him for the purpose of guiding and directing him, his failure to follow said Brinkley was of itself negligence, and if such negligence caused or contributed to his injury the jury should answer the second issue "Yes." (This the Court refused and defendant excepted.)

The Court charged the jury, that in determining the question of negligence, they should take into consideration the situation and conduct of both parties at the time of the injury, as disclosed by the evidence; and if they believe, from the evidence, that the injury resulted from the negligence of the defendant, and as hereinafter explained, and without any greater want of care on the part of the plaintiff than was reasonably to be expected from a person of ordinary care and prudence in the situation in which he found himself, then the plaintiff is entitled to recover." To this charge the defendant excepted.

The Court after giving the approved definition of contributory negligence, further charged:

"If jury find from the evidence that plaintiff, in going to the cars, the night being dark and stormy, used such ordinary care and prudence as a man of ordinary prudence would have used in walking to the cars under similar circumstances, then he would not be guilty of contributory negligence, and you would answer second issue "No."

(Defendant excepted.)

"7. It being shown by witnesses that there were no lights at or near the obstructions; that the plaintiff was a passenger with a regular ticket; that he walked from the ticket office to car in the night time on the regular route used by defendant's passengers, he having sworn that he knew nothing of the obstructions and nobody having contradicted him, if the jury find from the evidence the above facts to be true, then plaintiff was injured by negligence of defendant, and the jury will answer the first issue "Yes."

(To this charge defendant excepted.)

"8. It being admitted by defendant, in its answer, that it was its duty to have its grounds properly lighted, and to have its passenger coaches come up to its station, if the jury find that defendant failed to do either, and the plaintiff was injured in consequence thereof, they will answer the first issue "Yes."

"9. If the jury find that plaintiff was walking in the night in the usual route used by passengers in going from ticket office to coach, and he knew nothing of the planks obstructing, he had the right in law to assume the way was open and clear; and if it were snowing and there were no lights to disclose the position of the planks, then plaintiff is not guilty of contributory negligence, and the jury will answer the second issue "No." " Defendant excepted.

There was a verdict for the plaintiff for $500 and from the judgment thereon the defendant appealed.

Messrs. Jones & Boykin, for plaintiff.

Messrs. Shepherd & Busbee, for defendant (appellant).

FURCHES, J.: This is an action to recover damages received by the plaintiff on account of the alleged negligence of the defendant. It is admitted and found by the jury that defendant was guilty of negligence. And it is found that plaintiff was damaged to the amount of five hundred dollars, and there is no exception to this finding.

But it is alleged by defendant that plaintiff was also guilty of negligence, and that this was the proximate cause of the injury. It is also contended by defendant that the Court, by its charge in substance, instructed the jury that there was no contributory negligence, in violation of the rule in *Hinshaw* v. *Railroad*, 118 N. C., 1047.

The Court can never find, nor direct an affirmative finding of the jury. *State* v. *Shule*, 32 N. C., 153. The most the Court can do is to instruct the jury, where there is no conflict of evidence, that if they believe the evidence they should find yes or no as the case may be. But where there is no evidence, or no such evidence as should be allowed to go to the jury tending to establish the affirmative of the issue in dispute, the Court should direct the finding in the negative.

The burden of the issue of contributory negligence was on the defendant. And if there was evidence or such evidence as should go to the jury (*Wittkowsky* v. *Wasson*, 71 N. C., 451) tending to establish the affirmative of this issue, and that it might have been reasonably found for the defendant, the charge of the Court could not be sustained. *Hinshaw* v. *Railroad*, *supra*, but where there is no conflict in the evidence (as in this case) and but one reasonable conclusion could be deduced from it, then the Court has the right to direct the finding, if the jury believe the evidence, as a question of law. *Hinshaw* v. *Railroad*, *supra*.

The defendant introduced no evidence, but relied on the evidence of the plaintiff. The only evidence introduced by the plaintiff was that of himself and his son. And upon a careful examination of this testimony, we fail to find that it proves or tends to prove contributory negligence on the part of the plaintiff. The judgment must be affirmed.

Affirmed.

W. J. EDWARDS v. SEABOARD AND ROANOKE RAILROAD COMPANY, et al.

Action on Contract of Employment—Construction of Contract.

1. The meaning of the terms of a written contract is a question of law for the Court alone to determine.
2. Where a letter from an employer stated: "You have been appointed general storekeeper for the system to take effect July 15th. Your salary will be $1,800 a year;" and the appointee entered upon his duties and received $150 per month until he was discharged; *Held*, that the contract was not an employment by the year, the reasonable construction of the contract being that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will.

Civil action for the recovery of an alleged balance of salary due the plaintiff as general store keeper for defendants tried before *Adams, J.*, and a jury, at February Term, 1897, of Wake Superior Court. The letter set out in the opinion constituted the only contract between the parties. In response to issues the jury found that the plaintiff was employed by the year; that defendants wrongfully discharged him before the end of his term and that there was a balance due the plaintiff of $975 with interest from July 15th, 1896. Judgment was rendered accordingly and defendants appealed.

Mr. R. O. Burton, for plaintiff.

Messrs. L. R. Watts, McRae & Day and *J. B. Batchelor* for defendants (appellants).

Faircloth, C. J.: "July 10, 1894.—W. J. Edwards, Esq., Raleigh, N. C. Dear Sir:—I beg to advise that you have been appointed general store keeper for the system, to take effect July 15. Your salary will be eighteen hundred dollars a year. You will be in charge, &c.

(Signed) JOHN H. WINDER, Gen'l Manager."

The plaintiff accepted the appointment and went into the discharge of his duties and was paid $150 each month until January 1, 1896, when he was discharged from the service of the defendant. Plaintiff sues for balance of salary until July 15, 1896, alleging that he was employed *by the year* at $1800 for that period of time, and that he was wrongfully discharged, and the Court below so held.

We are called upon to determine the meaning of the instrument quoted above, according to its proper terms, and to do so it is important to find the intent of the parties as expressed by the language employed by themselves.

In a written contract, the terms are fixed and the meaning of those terms is a question of law for the Court alone, and in parol contracts the rule is the same where the terms are precise and explicit. *Massey* v. *Belisle,* 24 N. C., 170; *Simpson* v. *Pegram,* 112 N. C., 541. An entire contract is one in which the consideration is entire on both sides. "Whenever there is a contract to pay a gross sum for a certain definite consideration the contract is entire, and not apportionable either in law or in equity." Story Contracts, Section 22.

The contract before us is not specific as to the *term* of service, certainly not so expressed in the writing. The plaintiff does not so insist, but says a reasonable construction thereof leads to the conclusion that the parties intended a one year term of service. We are not able to see that such was their intention. It seems reasonable that if they had so intended they would have expressed themselves in more definite and explicit terms on so important a feature of their agreement. Why they were not more definite we cannot tell. They may or may not have had reasons for leaving the writing as it is, or they may not have called their minds to that feature of the contract. It does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will, for their own convenience.

All business men know they can make legal contracts to suit themselves, also the importance of saying what they mean in business matters in plain and definite terms.

As the case shows that the plaintiff has been paid for all services rendered, and he offered no other evidence, we hold that he cannot recover in this action, and this renders the consideration of other questions unnecessary.

Error.

T. H. PLEASANTS v. THE RALEIGH & AUGUSTA AIR LINE RAILROAD COMPANY

Action for Damages—Railroads—Negligence—Fellow Servants—Employment of Incapable Servants—Defect in Roadbed—Signals—Instructions.

1. The conductor of a side tracked train whose duty it is to close the switch and give the "all right" signal for the clear passage of another train on the main line, is the fellow servant and not the vice principal of the locomotive engineer of the latter train, both being employees of the same Company.
2. The fact that a switch was negligently left open whereby an accident was caused to a passing train, is not evidence of a defect in the roadbed for failure to keep which in safe condition a person thereby injured can recover damages from the Company.
3. Where, in the trial of an action for damages for an injury resulting from the negligence of a Railroad Company, it appeared that a con-

ductor of a freight train had been employed as such only three or four weeks and that he negligently left open a switch to a side track on which a section of his train was standing and gave the "all right" signal to a passing train on the main track, in consequence of which a collision occurred; *Held,* that such a presumption of negligence in the employment of an incompetent servant was raised against the Company by such facts as to warrant the submission of an issue as to such negligence.

4. Where the rules of a Railroad Company required the employees of a side-tracked train to close the switch after getting upon the side track and, upon the approach of a train on the main track, to give the "go ahead" or "all right" signal, and also forbade a train passing on the main track to go ahead until the requisite signal was given; *Held,* in the trial of an action for damages for an injury resulting from the negligence of defendant's servant in giving the "go ahead" signal when the switch was open, that it was error to charge that, "it being admitted that the switch was capable of bearing a signal light which would have showed red where the track was unsafe, it was the duty of the Company to use such signal light upon the switch."

CIVIL ACTION for damages tried before *Adams, J.*, and a jury, at April Term, 1897, of WAKE Superior Court. There was a verdict for the plaintiff for $10,375.00 which the defendant moved to have set aside on the ground of excessive damages. The motion was refused and from the judgment rendered on the verdict the defendant appealed, assigning as error the instructions to the jury. The facts upon which the action was based and which appeared on the trial, are set out in the opinion.

Mr. R. O. Burton, for plaintiff.

Messrs. L. R. Watts, McRae & Day and *J. B. Batchelor*, for defendant (appellant).

FURCHES, J.: On the 30th of January, 1896, the plaintiff and one Dunn, were both in the employ of the defendant—the plaintiff as locomotive engineer on a freight train, and Dunn as conductor of a freight train. On that day the plaintiff was operating a train running from Monroe, North to Raleigh, and Dunn was running his train from Raleigh, South. These trains should have passed each other at a station on the defendant's road, called Manly but, by the fault and negligence of Dunn, the plaintiff's train ran into Dunn's train and the plaintiff was badly injured. There were side tracks at Manly and when plaintiff's train reached that station, plaintiff found Dunn's train there, standing on the side track: and, being too long for one side track, it had been divided into two sections and one of these placed on either side of the main track. Rule 94a of the defendant Company required the conductor or flagman of the train first reaching stations where it was necessary to side track for a passing train, that is, made it the duty of Dunn or a flagman, to close the switch of the side track after moving the train off the main line, and, when the switch was closed and secured, to signal the approaching train on; that is, to give the "all right" signal, and the approaching train passes on without stopping. When the plaintiff reached Manly with his train, he found Dunn's train on the side track, Dunn standing at the switch. When Dunn gave him the "all right" signal, the plaintiff drove his train forward. But, instead of the switch being closed as it should have been, it was left wide open and a fearful crash took place in which the plaintiff was terribly injured and much other damage done. Dunn had only been employed as such conductor three or four weeks.

The plaintiff claims that upon these facts the defendant is liable to him in damages for the injuries he received.

In the first place the plaintiff denies that he and Dunn were fellow servants of defendant Company, and alleges that Dunn was his vice-principal. Plaintiff also contends that his injuries were caused by reason of a defective road-bed, or track, for which defendant is liable without reference to the question of vice-principal. He also contends that defendant negligently and carelessly employed Dunn as conductor, who is negligent and incompetent to perform the duties of his position, and he was thereby injured. If either of these positions is sustained, the judgment of the Court below should be sustained, unless error was committed on the trial.

In the catholic sense of the term, the plaintiff and Dunn were fellow servants. They were both employed by and in the service of defendant Company. *Wauder* v. *B. & O. Railroad*, 32 Ind. 411; *Railroad* v. *Arnold*, 31 Ind. 174; *Warner* v. *Erie Railroad*, 39 N. Y., 468; Wharton's Law of Negligence, Section 229; Cooley on Torts, 543; *Randall* v. *B. & O. Railroad*, 109 U. S., 747. The same doctrine is held in *Hobbs* v. *Railroad*, 107 N. C., 1; *Hagins* v. *Railway*, 106 N. C., 537; *Webb* v. *Railroad*, 97 N. C., 387; *Kirk* v. *Railway Co.*, 94 N. C., 625.

In *Rittenhouse* v. *Railway Co.*, 120 N. C., 544, it is held that the motorman and a track superintendent in the employ of the same company are fellow servants.

In *Ponton* v. *Railroad*, 51 N. C., 245, a case very similar to this, where a switch had been left open by the operators of the train that had side-tracked to let another train pass, and the passing train ran into the train on the side track and injured an employee on the train side-tracked, Ruffin, C. J., delivering the opinion of the Court said, that they were fellow servants and the action could not be maintained. So, to enable the plaintiff to recover upon the first ground assigned, it must not only appear that plaintiff and Dunn were fellow servants, but it must also appear that Dunn was the vice-principal of the plaintiff. That is, that Dunn was the superior of the plaintiff and had the power to dismiss the plaintiff from his employment. *Turner* v. *Lumber Co.*, 119 N. C., 387.

Purcell v. *Railroad*, 119 N. C., 728, holds that a conductor on an independent train is the vice-principal as to a brakeman on *that* train.

Shadd v. *Railroad,* 116 N. C., 968, holds that the conductor is a vice-principal as to those on *his* train subject to his orders.

It is said in *Mason* v. *Railroad,* 111 N. C., 482, that the conductor on the train is not a fellow servant of a person employed in coupling cars. By this statement which is not necessary to the decision of the case, we understand the Court to mean that the conductor in this case was the vice-principal of the person coupling cars.

But none of these cases sustain the plaintiff's contention that Dunn was his vice-principal. They all relate to conductors and the employees on *that* train, who are under and subject to his command. That is not the case here. But to show more clearly that Dunn was not the vice-principal—the superior officer of the plaintiff—we see that the rule referred to, (94a), provides that this work—closing the switch and giving the signal "all right"—may be done by Dunn or by a *flagman* on Dunn's train. Suppose it had been the flagman on Dunn's train that stood by the switch and gave the signal "all right," would it be contended that he was the superior and the vice-principal of the plaintiff? If not, can it be contended that Dunn, doing the work of a flagman, was the plaintiff's vice-principal? The plaintiff must fail on this contention.

The next contention is that the defendant is bound to keep its road-bed in good condition, and that this is a duty devolving upon it that cannot be delegated; and the fact that this switch was not closed was a defect in the defendant's road-bed that caused the plaintiff's injury, and that the defendant is liable to him in damages on this account. But this contention cannot be maintained. There was no defect in the road-bed. It was sound and in good condition, and was not the cause of the plaintiff's injury. That was the result of the carelessness or the incompetency of Dunn, and the defendant is not liable unless it can be made so through the negligence or incompetency of Dunn. This we have seen he cannot do, unless he was negligently employed by the defendant.

The plaintiff's next contention is that Dunn was negligent and incompetent when employed and that the defendant knew this, or could have known it by the exercise of reasonable care, which was not exercised, in his selection and employment.

There was no evidence that the defendant knew of the incompetency of Dunn when he was employed, except his action on the occasion of this fearful wreck, and the fact that he had not been employed in this capacity more than three or four weeks. These facts raise such presumptions against the defendant as to make this an issue fit to be submitted to the jury under proper instructions from the Court. *Lee* v. *Railroad Co.*, 87 Michigan 575; *Evansville &c., Railroad* v. *Guyton*, 115 Ind. 450; *Keith* v. *New Haven &c., Railroad*, 140 Mass. 175; Bailey Liability for Injury to Servants, pages 46–56.

The Court among other things charged the jury as follows to which the defendant excepted:

1. "That the conductor Dunn and the plaintiff under the evidence were not fellow servants."

2. "That Dunn in his duty of managing the switch and giving the signal to plaintiff represented the defendant in the performance of absolute duties which the company owed to the plaintiff, and his negligence, if any, was the negligence of the Company and not of a fellow servant."

3. "That Dunn in his duty of signaling to the plaintiff when the track was clear represented the Company in the

performance of an absolute duty which the Company owed to the plaintiff, and if he was negligent it was the negligence of the Company and not of a fellow servant."

4. "That, it being admitted that the switch was capable of bearing a signal light, which would have showed red when the track was unsafe, it was the duty of the Company to use such signal light upon the switch."

There was error in these instructions for which the defendant is entitled to a new trial.

New trial.

DOUGLAS, J., dissenting: I am forced to dissent from the opinion of the Court, and especially from the propriety of its promulgation after every matter in controversy had been fully settled between the parties, and a final judgment by consent entered in the Court below; but it seems needless to enter into any lengthy discussion of a repudiated doctrine, which, beyond one or two pending cases, has no further power to harm.

H. G. HERNDON v. THE NORTH CAROLINA RAILROAD COMPANY.

Practice—Motion in Supreme Court for New Trial—Notice—Costs.

1. Inasmuch as the granting or refusing in this Court a new trial for newly discovered evidence is a matter of discretion resting upon the peculiar circumstances of each case and not a matter of law, so as to establish a precedent for future guidance, the Court will not discuss the facts but simply grant or refuse the motion
2. Where a motion in this Court for a new trial, for newly discovered testimony, is contemplated, notice of such motion, with a copy of the affidavit relied upon, should be served upon the opposite party at least ten days before the beginning of the call of the District to which the cause belongs.

3. Inasmuch as heretofore there has been no precedent requiring ten days notice of a motion for a new trial. because of newly discovered testimony, and the appellee having had time to file counter affidavits, and having done so, the motion will not be denied for failure to serve such notice.

4. When a new trial is granted on motion in this Court, for newly discovered evidence, the costs in this Court will fall on the party making the motion, unless in exceptional cases and for special reasons.

DOUGLAS, J., dissents *arguendo*, in which FURCHES, J., joins.

ACTION for damages tried before *Timberlake, J.*, and a jury at June (Special) Term, 1897, of DURHAM Superior Court. There was a verdict for the plaintiff and from the judgment thereon defendant appealed. In this Court a motion was made for a new trial on the ground of newly discovered evidence.

Messrs. Boone & Bryant and *Winston & Fuller*, for plaintiff.
Mr. F. H. Busbee, for defendant (appellant).

CLARK, J.: The granting or refusing in this Court a new trial for newly discovered evidence, being a matter of discretion, resting upon the peculiar circumstances of each case, and not a matter of law from which a precedent can be laid down for future guidance, the Court will never discuss the facts in an opinion, but simply grant or refuse such motion as it deems will best subserve the ends of justice. *Brown* v. *Mitchell*, 102 N. C., 347; *Ferebee* v. *Pritchard*, 112 N. C., 83; *Clark* v. *Riddle*, 118 N. C., 692; *Nathan* v. *Railroad*, Ibid, 1066. The Court in the present instance, upon consideration of the affidavits, grants the motion.

It is proper to say that, when a motion for a new trial for newly discovered evidence in this Court is contemplated, notice of such motion should be always given the other side and a copy of the affidavits served therewith. The respondent should also serve a copy of his counter affidavits, if time permits. Thus there will be no surprise on either party and the Court will be put in full possession of the facts. The appellant should give this notice at least ten days before the beginning of the call of the District to which the cause belongs, unless the information comes to him after that time, when the Court may shorten the notice and, if necessary, give the respondent time to file counter affidavits. *Code*, Section 595. New trials for newly discovered evidence are not favored either in the trial Court or on appeal, and the party moving on that ground must not only negative *laches* in himself in discovering the evidence relied on, but must give reasonable notice to the other party of the motion based thereon. In this case ten days notice was not given, as it should have been, but there had been no precedent requiring it, and the appellee had opportunity to file counter affidavits, and did so.

The appellant will pay the costs in this Court. When a new trial is granted, the costs of the appellate Court are always a matter of discretion. *Code*, Section 527 (1). When the new trial is on the ground of newly discovered evidence, the costs of the appellate Court should always fall upon the party obtaining the new trial, unless in exceptional cases and for special reasons, since the other party is in no *laches*, as is shown by its having obtained the judgment below. This is also a wholesome rule of practice, as new trials on this ground are outside of the regular course and are only granted, in discretion, when justice requires a departure from the usual procedure. By analogy, when a continuance is asked for on the ground of newly discovered evidence, the Statute expressly forbids it to be granted except upon payment of the costs of the Term. *Code*, Section 402 (2).

Motion allowed.

DOUGLAS, J., dissenting: I fully concur in the rules laid down by the Court to be followed in all applications for a new trial on account of newly discovered evidence; but I cannot concur in its judgment granting a new trial, as not a single one of the imperative rules has been observed by the appellant. No notice whatever was given to the appellee who was left in entire ignorance of the intention of the appellant until the case was called for hearing in its regular order upon the docket of this Court. The appellant does not, in my opinion, show due diligence in obtaining this testimony. The testimony itself is slight, one of the three affidavits being simply as to character, and another as to diligence, leaving only one of a substantive character, and that applying properly only to the issue of contributory negligence. The granting a new trial in this case gives to the appellant all that he could possibly obtain by a successful prosecution of his appeal, and deprives the appellee of the benefit of his judgment upon purely *ex parte* testimony, without the opportunity of defence. In the conscientious exercise of an equitable discretion, I am forced to respectfully dissent from the judgment of the Court.

FURCHES, J.: I concur in the dissenting opinion.

C. A PARKER v. THE SOUTHERN RAILWAY COMPANY.

Practice — Appeal — Laches — Notice to Reinstate Dismissed Appeal.

1. Where an appeal has been dismissed under Rule 5, for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial Judge, on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere

2. Failure of counsel to answer a motion to dismiss an appeal regularly made is not excused because he did not think the motion would be considered at once.

3. The proper course for an appellant, the settlement of whose case on appeal has been delayed without his default, is to docket the record proper during the first two days of the call of causes, from the District and ask for a writ of *certiorari* for the case on appeal.

ACTION for damages, tried before *McIver J.*, and a jury, at August (Special) Term, 1897, of GUILFORD Superior Court. There was a verdict for the plaintiff and defendant appealed from the judgment thereon. In this Court the plaintiff moved to dismiss the appeal under Rule 17, which was allowed and thereupon the defendant moved to reinstate the case on the grounds set out in the opinion.

Mr. J. T. Morehead, for defendant.
Mr. F. H. Busbee, for plaintiff (appellant).

CLARK, J.: Judgment was rendered below in this case prior to the beginning of this Term, and the transcript on appeal not being docketed here during the first two days of the call of the District to which it belongs, as required by Rule 5 (119 N. C., 930), the appellee filed the certificate and had the appeal dismissed as allowed by Rule 17. The appellant now moves, on notice, to reinstate.

With a view to negative *laches* and to show that it could not have docketed the appeal in time, the appellant filed the correspondence in reference to settling the case, from which it appears: That the cause was tried at Guilford Superior Court, August 11, 1897, the appeal bond was filed August 20, and the case on appeal and counter-case were served within the time agreed and before the end of that month; that defendant's counsel asked the Judge to "settle" the case on appeal at Richmond Court in September, to which the Judge assented, telling counsel to name his day, but defendant's counsel did not attend because his client called him off elsewhere; defendant's counsel then asked the

Judge to settle the case at Wilmington, which his Honor agreed to do, appointing October 22 as the day. His Honor remained over in Wilmington two days for the purpose, but defendant's counsel did not attend, being elsewhere engaged by his client. Defendant's counsel, who lived in Raleigh, invited the Judge to come by Raleigh and stop over to settle the case, but his Honor's duties called him to other Courts and he could not find it convenient to come to Raleigh for that purpose. Finally, on Wednesday, October 27th, (the last day on which the appeal could be docketed as a right), the defendant's counsel sent the papers to the Judge, as he could have done weeks before, who promptly settled the case and sent it to the Clerk of Guilford Superior Court on November 1. The transcript reached here on November 5.

Upon the defendant's own showing there was inexcusable negligence, and as the appellee insists on his rights the motion to reinstate must be denied. At the most, the facts would show that the counsel personally was in no default, as his failure to attend to the matter was in each instance caused by his client's calling him off to attend to other matters which it must have deemed more important, but this is no excuse for the defendant whose duty it is, like any other litigant, to attend to its legal business in apt time and to have enough counsel to do this. It would appear from the affidavit, however, that counsel was not entirely without *laches*, as it states that he "did not answer the motion to dismiss because he did not think it would be considered at once." *Paine* v. *Cureton*, 114 N. C., 606. The motion was lodged Wednesday, October 27, and the appellee was entitled to have had it granted Thursday morning, October 28, (*Smith* v. *Montague*, at this Term), but in fact it was not allowed until Saturday, the last day of the call of that District.

Besides, if the appellant had been in no default as to settling the case, it was its duty, during the first two days of the call of causes from the District, to have docketed the record proper and have asked for a writ of *certiorari* for the case on appeal. *Burrell* v. *Hughes*, 120 N. C., 278, in which it is said, "There are *some* matters which should be deemed settled, and this is one of them." That case cites *Pittman* v. *Kimberly*, 92 N. C., 562; *Owens* v. *Phelps*, 91 N. C., 253; *Porter* v. *Railroad*, 106 N. C., 478; *Stephens* v. *Koonce*, Ibid, 255; *Pipkin* v. *Green*, 112 N. C., 355; *State* v. *Freeman*, 114 N. C., 872; *Paine* v. *Cureton*, Ibid, 606; *Graham* v. *Edwards*, Ibid, 228; *Haynes* v. *Coward*, 116 N. C., 841; *Causey* v. *Snow*, Ibid, 497; *Shober* v. *Wheeler*, 119 N. C., 471; *Brown* v. *House*, Ibid, 622; *Guano Co.* v. *Hicks*, 120 N. C., 29, and several other cases, showing that the practice is too well settled to be debatable.

Motion denied.

D. S. BARRUS v. THE WILMINGTON & WELDON RAILROAD COMPANY.

Practice—Appeal—Service of Case on Appeal—Failure to Serve Case in Time—Settlement of Case on Appeal by Judge—Affirmation of Judgment.

1. An endorsement by counsel, who accepted service of case on appeal adding the date and stating that he did not waive the objection that the case was served too late, was competent and properly certified by the Clerk as a part of the proceedings in the case.
2. The settlement of a case on appeal by the Judge does not cure the failure to serve the case within the time fixed by law.
3. The absence of a legally settled case on appeal does not entitle the appellee to have the appeal dismissed but, where no error appears on the face of the record proper, judgment must be affirmed.

ACTION for damages for injury to a horse tried on appeal from a judgment of a Justice of the Peace, before *McIver, J.*, and a jury, at Spring Term, 1897, of Lenoir Superior Court. The plaintiff submitted to a non-suit on the intimation of his Honor that he could not recover and appealed. In this Court the defendant moved to dismiss because the case on appeal was not served in time and also to affirm the judgment for want of a case and because no errors appear in the record.

Mr. W. R. Allen, for plaintiff (appellant).
Mr. R. O. Burton, for defendant.

CLARK, J.: It was competent for counsel who accepted service of the case on appeal, after the time limited by Statute, to add to his endorsement the date and that he did not waive the objection that the case was presented too late.

Such endorsement was properly certified by the Clerk as a part of the proceedings in the case. *Cummings* v. *Huffman*, 113 N. C., 267. The failure to serve the case on appeal within the time fixed by law was not cured by the Judge's settling the case on appeal. *Forte* v. *Boone*, 114 N. C., 176; *McNeill* v. *Railroad*, 117 N. C., 642. If there had been no endorsement as above and the appellee had filed an affidavit that service had not been in time, it might have been necessary to have the facts as to the date of service found by the Judge below, unless the Judge should find them in settling the case, as he should always do if there is a controversy on that point. *Walker* v. *Scott*, 102 N. C., 487; *Cummings* v. *Huffman*, *supra*. But here there is no real contention that the case on appeal was served in time; certainly no affidavit is offered to contradict the endorsement of the date of acceptance of service made on the plaintiff's case on appeal by the appellee's counsel. There being no case on appeal legally settled does not entitle the appellee to have the appeal dismissed, but, as no error appears upon the face of the record proper, the judgment must be affirmed. *Delafield* v. *Construction Co.*, 115 N. C., 21.

Affirmed.

J. J. E. LUCAS and wife v. CAROLINA CENTRAL RAILWAY COMPANY.

Action for Damages for Breach of Contract—Injuries to Real Estate — Venue — Pleading — Practice — Numbering Exceptions on Record—Marginal References to Exceptions.

1. Exceptions taken on a trial should not only be numbered (Rule 21) and noted on the margin of the record (Rule 21) but such numbering and marginal references should be printed as they are necessarily a part of the case on appeal.
2. An error as to the venue is not now, as formerly, a defect affecting jurisdiction but only ground for a motion to remove which is waived unless the motion is made "in writing" and "before the time of answering expires"
3. The fact that a complaint for injuries to real estate fails to expressly allege in what County the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper County.

CIVIL ACTION tried before *Coble, J.*, and a jury at Spring Term, 1897, of BLADEN Superior Court, to recover damages from the defendant resulting to plaintiff's land from the defendant's failure to comply with a consent judgment rendered in an action between the same parties at Fall Term, 1889, of BLADEN Superior Court, for injuries to the real estate of plaintiffs. The judgment referred to was as follows:

"This cause coming on to be heard, by consent and agreement of parties, it is agreed: That the defendant shall pay to the plaintiff's attorney, C. C. Lyon, one hundred dollars, and shall pay the costs of this action, to be taxed by the Clerk; and shall widen or deepen the ditch on the north side of the track of the defendant from Tom Daniel Ridge to Corcan Branch or near Wayman Creek, and shall do this ditching within a reasonable time—say six months. And the plaintiffs agree to accept the same in full payment, satisfaction and compromise of all damages they have sustained by reason of the construction of ditches and water drains, and all damages by reason of changing and diverting any water from its natural course, and all damages by reason of overflowing plaintiffs' land named in complaint with water, and all damages resulting from placing an embankment on defendant's track across branch running through plaintiffs' land, and of all damages to plaintiffs' land by overflow of water from all sources.

In accordance with the above agreement, and by consent of parties, it is adjudged: That the plaintiffs recover of the defendant the sum of one hundred dollars, the same to be paid to C. C. Lyon, attorney of plaintiffs, and the costs of this action, to be taxed by the Clerk."

The defendant answered alleging that they had complied with the judgment which was set out in full in the answer. At the close of the testimony the defendant moved (not in writing) to remove the cause from Bladen County to Columbus County for trial for the reason that no part of the land injured, as shown by the testimony, lay in Bladen County but in Columbus County. The motion was overruled. There was a verdict for the plaintiffs for $800.00 and from the judgment thereon the defendant appealed.

Mr. C. C. Lyon, for plaintiffs.

Messrs. MacRay & Day and *J. D. Shaw*, for defendants (appellants).

CLARK, J.: Though there is a large number of exceptions, they are not numbered as required by Rule 27 and noted on the margin of the record as required by Rule 21. Being necessarily a part of the "case on appeal" the numbering of the exceptions and marginal references thereto should be printed. It is a great convenience on the argument to have this, especially when, as in this case, the exceptions are numerous. The attention of appellants is called to what was said on this subject in *Alexander* v. *Alexander*, 120 N. C., 472 (on page 474) and to the penalty prescribed by Rule 20 for failure to comply with the Rule.

Without adverting to the fact that this is an action for damages resulting from breach of a contract (set out as the basis of a former judgment) to do certain ditching on the defendant's own land and not directly for a tort for "injuries to real estate," the motion for a change of venue was properly refused. If it be conceded that it was an action for "injuries to realty," *The Code*, Section 190 (1), an error as to the venue is not as formerly a defect affecting the jurisdiction, but only ground for a motion to remove, which was waived, since the motion was neither "made in writing" nor "before the time of answering expired." *Code*, Section 195; *McMinn* v. *Hamilton*, 77 N. C., 300; *Lafoon* v. *Shearin*, 91 N. C., 370 (which was an action of ejectment); *Morgan* v. *Bank*, 93 N. C., 352; *County Board* v. *State Board*, 106 N. C., 81; *Baruch* v. *Long*, 117 N. C., 509.

There is no force in defendant's suggestion that the complaint does not disclose in what County the land lies, for it alleges as the cause of action the breach of the agreement embraced in the judgment, referring to the judgment appropriately, so that the defendant, by examining the pleadings in such former action, would have had notice of the *locus* and, indeed, in its answer the defendant sets out the judgment and contract in full and avers it has fully complied therewith and has done the ditching therein required. Besides if there had been any doubt as to the locality, the defendant could have asked for a bill of particulars before answering (*Code*, Section 259; *Bryan* v. *Spivey*, 106 N. C., 95) or that the pleading be made more specific. *Code*, Section 261; *Fulps* v. *Mock*, 108 N. C., 601.

There are many other exceptions, but they are without merit and need not be discussed. Though not abandoned, with propriety they were neither insisted upon nor argued in this Court.

No error.

J. T. PRUDEN v. ASHEBORO AND MONTGOMERY RAILROAD COMPANY.

Contract—Accord and Satisfaction—Compromise—Attempted Alteration of Contract.

The acceptance, by telegram, of an offer, made by telegram, to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by the debtor of the amount which was retained by the creditor, constitutes a contract, by way of compromise in full satisfaction of the claim, which the creditor has no right to alter by the form of receipt given for the money.

CIVIL ACTION for an alleged balance due on contract for work done by plaintiff for defendant tried before *Coble, J.*, and a jury at July Term, 1897, of RANDOLPH Superior Court. There was a verdict for the plaintiff and from the judgment thereon the defendant appealed. The facts appear in the opinion.

Mr. J. T. Morehead, for plaintiff.
Messrs. Douglass & Holding, for defendant (appellant).

FURCHES, J.: The plaintiff had a contract with defendant to grade its road-bed from Star to Asheboro. The plaintiff did the work and defendant paid plaintiff thereon the sum of $7,744.48, leaving an admitted balance still due the plaintiff. But they differed as to this amount, as the plaintiff contended that the estimates were to be made by one rule, and the defendant contended they were to be made by another. The plaintiff contended that the work of grading amounted to $12,620.04, and that the amount still due him was the difference between $12,620.04 and $7,744.48; while the defendant contended that the whole work done by the plaintiff did not amount to so much as the plaintiff claimed. The parties finding that they could not agree upon the amount still due, terms of compromise were discussed, and the plaintiff offered to take $3,000 in payment for what was still due. But the defendant declined this proposition, and the plaintiff left without any terms being agreed upon.

After plaintiff had left, the defendant caused the following telegram to be sent to the plaintiff: "J. T. Pruden, Care No. 7, cd.—A. F. Page feels that he has conceded enough in settlement with you, but in order to settle the matter and avoid any further trouble on our part, we hereby agree to your proposition paying you a balance of $3,000 in full for balance due. Answer if satisfactory." (Signed Page Lumber Company). To which plaintiff replied by telegram as follows: "Page Lumber Co.—Message received. Send checks to Ashboro." (Signed J. T. Pruden.) In reply to this, defendant sent the following telegram to J. T. Pruden: "Please say by wire if checks for $3,000 will be received by you as payment in full." (Signed Page Lumber Company.) On the back of this telegram the following endorsement, admitted to be genuine, and made by J. T. Pruden, when he answered the telegram "Ans."—"That was what I meant." (Signed) J. T. P." The telegram itself was as follows: "P. L. Co.—"Ans.—That was my proposition, send checks and receipt shall follow." (Signed J.

T. Pruden). Defendant upon the receipt of this last telegram sent plaintiff checks amounting to three thousand dollars accompanied by the following receipt for the plaintiff to sign and return: "Aberdeen, N. C., Sept. 19, 1896. $3,000. Received of Robert N. Page, treasurer, his check No. 2340 on Commercial & Farmer's Bank, Raleigh, N. C., for $700; check of A. F. Page on Commercial & Farmer's Bank, Raleigh, N. C., for $1,000; and R. N. Page, treasurer, check dated September 29, on the same bank payable to A. Leazer, Superintendent for $1300, a total of three thousand dollars in full payment for grading the Ashboro & Montgomery Railroad from Ashboro to Star." To this receipt the plaintiff added the following: "And for all other services rendered by me to said Company—said sum being a balance upon a settlement made upon the basis of a final estimate, made by the engineer of said company, of the entire work done by me on said road, which is as follows—114,000 cubic yards earth 880.87½—100 cubic yards of solid rock, and for extra work $80.70." (Signed) J. T. Pruden.

The plaintiff retained the checks amounting to $3,000 but signed and returned the receipt to the defendant in this altered condition.

The plaintiff's proposition to take $3,000, at their first meeting by way of compromise, was not accepted by defendant, and therefore failed. *Gregory* v. *Bullock*, 120 N. C., 260. But defendant afterwards by telegram proposed to accept the plaintiff's terms, and to pay him $3,000 by way of compromise in full satisfaction of plaintiff's claim. This proposition the plaintiff accepted, and defendant at once sent plaintiff $3,000 as directed by plaintiff in his telegram of acceptance. This proposition of defendant to pay $3,000 in full of plaintiff's claim, and the acceptance of the same by the plaintiff, was a contract, and the plaintiff had no right to alter or change it. He could not accept the payment and change the terms upon which the defendant paid it. *Long* v. *Miller*, 93 N. C., 233. The plaintiff, having agreed to take $3,000 by way of compromise in full satisfaction of his claim and having been paid that amount by defendant, cannot maintain this action. *Code*, Section 574.

There are many other exceptions presented by the record, involving the introduction and exclusion of evidence, and also as to the charge of the Court, but none of these bear upon or in any way affect the exception we have discussed in this opinion. And, as the exception we have discussed is decisive of the case, we have not considered the others.

Error.

IREDELL WILLIAMS v. SOUTHERN RAILWAY COMPANY.

Parent and Child—Injury to Child—Action by Parent for Loss of Services.

Where a minor son of plaintiff was employed by defendant without the knowledge or consent of the father and was injured while so employed, but the injury was not due to the employer's negligence; *Held*, that there can be no recovery by the father for loss of services after and in consequence of the injury.

CIVIL ACTION tried at Fall Term, 1897, of SURRY Superior Court before *Starbuck*, *J.*, and a jury.

The following are the agreed facts: "That one W. W. Rister, agent of the defendant, employed John Williams, the son of plaintiff; that John Williams was at that time 19 years old; that he so told Rister at the time of the employment, also at the same time told Rister that his father consented to his working for himself; that the father did not know of the employment of John Williams by the defendant; that John Williams was afterwards injured while in the employment of defendant, and while working on a bridge on defendant's road, but without any negligence on the part of defendant or its servants at the time of this injury. The claim of plaintiff is for damages for loss of services after and in consequence of the injury on the bridge. If the Court is of opinion on these facts that plaintiff is entitled to recover, it is agreed that judgment be rendered for the plaintiff for $40; otherwise, that the action be dismissed."

The Court, being of the opinion that, on the facts agreed, the plaintiff was not entitled to recover, ordered and adjudged that plaintiff take nothing, and defendant go without day, etc. Plaintiff appealed.

Mr. Virgil E. Holcombe, for plaintiff (appellant).
Messrs. Glenn & Manly, for defendant.

CLARK, J.: The defendant employed the minor son of the plaintiff. The son told the defendant's representatives that his father consented to his working for himself, but in fact his father did not know of the defendant's employing his son; and the latter was injured while in the defendant's service, but, it is admitted, without any negligence on the part of the defendant or of its servants. The plaintiff sues for loss of services after and in consequence of the injury. For the services the son had rendered, compensation belonged to the father; but, as the loss of further services was caused by an injury which was not caused by the fault of the defendant, it cannot be held liable for such loss.

No error.

MORGANTON MANUFACTURING COMPANY v. OHIO RIVER & CHARLESTON RAILWAY COMPANY.

Action for Damages—Bill of Lading—Damaged Goods—Liability of Carrier.

1. A bill of lading is both a contract and receipt; as a *contract* to carry and deliver the goods upon the terms and conditions specified in the instrument, it cannot be explained by parol testimony so as to alter its legal effect, in the absence of fraud or mistake, but as a *receipt* or acknowledgment of the quantity, character or condition of the articles, it may be explained, varied or contradicted like any other receipt.
2. Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption.
3. When a box of goods is shipped over connecting lines and the terminal line receives the box in apparently good condition and marks the bill of lading "O. K." and the goods are found to be damaged at the end of the line, a rebuttable presumption is raised that the damages occurred on that line.
4. If the condition of the contents of a box is unknown to a railroad which receives it for transportation over its line, a failure to guard against liability for the condition of such goods by examination or stipulation is negligence.

CIVIL ACTION for damages tried before *Greene, J.*, and a jury at Fall Term, 1897, of MCDOWELL Superior Court on appeal from a judgment of a Justice of the Peace. The facts are stated in the opinion of Chief Justice Faircloth. The instructions prayed for by the defendant on the trial and referred to in the opinion as having been properly refused, were as follows:

"1. When the testimony is direct, leaving nothing to inference, and, if believed, is the same thing as the fact sought to be proved, it becomes a question for the jury; but when the evidence offered by the plaintiff is circumstantial, or the evidence offered by the defendant tends to explain it, or rebut the inferences sought to be drawn from it, as in this case, then it is a question for the Court."

"2. The plaintiff seeks to recover judgment against the defendant company for its negligence in transporting this box of glass, and relied upon the fact that the goods arrived at their destination on the car of the defendant, in a broken condition, or was so broken when opened and examined at its warehouse. The law infers that they were damaged by its negligence; and nothing more appearing, the plaintiff would be entitled to recovery. The defendant, however, replies by introducing testimony to rebut this inference or presumption of law; and whether the presumption is rebutted by the evidence is a question for the Court; and I hold that this inference or presumption of the law is rebutted by the defendant's testimony, if you believe the evidence of the defendant's witnesses; and no evidence being introduced but the plaintiff's to show a negligent breaking, you should render a verdict for the defendant."

"3. A carrier is not required to examine contents of a package, if from outside appearances it is in good order. They have a right to assume that it is in good order; and if they receive it as in good order, from external appearances, although the contents are afterwards found, upon examination, to be in bad order, the railroad company will not be held liable, unless the goods were damaged by its negligence."

"4. It was not negligence in the defendant company to receive this freight from a connecting carrier, or even marking it all right! 'O. K.,' or in good order, if the defect is a latent defect, and could not be detected from inspection of the outside. Nor is the defendant company liable by checking the goods as 'O. K.,' or even in good order."

Messrs. S. J. Ervin and *E. J. Justice*, for plaintiff.
Mr. P. J. Sinclair, for defendant (appellant).

FAIRCLOTH, C. J.: A box of plate glass was shipped from

New York City to Marion, N. C. The Pennsylvania Railroad Company, the initial carrier, received and transferred the case to the Norfolk & Western Road at Hagerstown. Then the car containing the box was transferred at Roanoke to the Cape Fear & Yadkin Valley road and by them brought to the Seaboard Air Line Road at Sanford with the seal of the latter on the car at Shelby, N. C. At that place the agent of the defendant broke the seal and checked off the contents of the car on the way bill and examined the box and found it in apparent good order. He said in his testimony that there were no marks of rough usage on the outside of the box—that he took a copy of the way bill and delivered it to the defendant's conductor, who carried the car and copy of the way bill to Marion and that he (the agent) marked the way-bill O. K.; also that he did not examine the contents of the box and that his company did not require him to give a receipt for freight transferred to defendant from connecting lines. The defendant's agent at Marion testified that he received the box and that the glass was not damaged in taking it off the car, nor while it was in the depot at Marion; that ten days thereafter he and plaintiff's agent opened the box and found the glass badly damaged. A contractor and builder examined the box and said it must have fallen and struck something hard, causing the break in the glass.

The agent of the first carrier at New York, sent a bill of lading with the package, stamped on its face "Released" and gave a receipt for the box "in apparent good order (contents and condition of contents unknown) to be transported to and delivered at the regular freight station of the company at ———— subject to all the conditions" &c., among which were these words "No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route," &c. This action is against the terminal carrier.

The defendant contends that it is not liable unless it be shown that the damage occurred on its line and that there is no evidence that that was so.

We understand "released" to mean exemption from the common law liability as an insurer. It seems to be agreed that O. K. means all right or in good condition. *Baxter* v. *Ellis*, 111 N. C., 124. It must be admitted that the present system of rapid transit, consisting of through lines, connecting lines, associated lines and the like, makes it difficult in some cases to locate the line on which the damage occurs, and it would seem practicable for the interested line to make some arrangement for their own benefit and the public convenience by prorating the freight charges and also the damages, when they cannot be located, and thereby avoid the inconvenience of actual inspection at every transfer, which would not be only inconvenient and cause much delay but serious loss to the consignee.

This case illustrates the difficulty. The glass being very thick could not have been broken without a severe jar, and looking at the evidence it is scarcely possible to see where or how it occurred.

The case does not fall within the principle of *Rocky Mount Mills* v. *Railroad*, 119 N. C., 693, where it was held that the associated companies were partners, and each one liable for the negligence of either of the other lines. We are not required to discuss the liability of the other lines which handled the package of glass. The first discovery of damage was when the goods were at the terminal point of the defendant's line.

A bill of lading is something more than a simple receipt. It is a receipt and a contract. As a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, it is a merger of prior and contemporaneous agreements of the parties, and, being in writing, cannot be explained by parol evidence, and thereby change its legal import, in the absence of fraud or mistake. It also, by the terms of the writing, as in this case, excludes the common law liability of the carrier, because it is a special contract governed by its own limitations. The bill, as a receipt, is an acknowledgment of the quantity, character and condition of the articles delivered and received, and as such may be explained, varied or contradicted like other receipts. This exemption from the common law liability may be enforced, if it be reasonable and does not involve exemption from negligence. Ray's Negligence of Imposed Duties, p. 93, 94 and 95; *Pollard* v. *Vinton*, 105 U. S., 7; Elliott on Railroads, Section 1415.

The defendant's agent having received the box apparently in good condition and marked the bill of lading "O. K," was an adoption of the terms and conditions specified in writing by the initial carrier, and these facts raise a rebuttable presumption that the damage occurred thereafter. The defendant endeavored to meet and overcome this presumption with evidence, and went to the jury with his evidence. The Court charged the jury that among connecting lines the carrier, in whose hands the property is found damaged, is presumed to have caused the damage and that the burden is upon the defendant to rebut this presumption and satisfy the jury that the glass was not damaged in its possession. In response to the inquiry of the jury, the Court charged them that, if the condition of the contents was unknown to the defendant, liability could have been guarded against by examination or stipulation, and that failure to do so was negligence. This we think was correct according to the authorities and the facts.

The instructions asked for by defendant were not suited to the facts, and ignored the presumption just pointed out, and were properly refused. It has been held that the stipulation above stated is a reasonable one and consistent with public policy. *Phifer* v. *Railroad*, 89 N. C., 311. It has also been held by this Court that, if the contents and their condition be unknown, liability may be avoided by examination or by a stipulation, and that it is negligence in a receiving line not to observe these precautions. *Dixon* v. *Railroad*, 74 N. C., 538.

Affirmed.

J. H. EVERETT v. RECEIVERS OF RICHMOND and DANVILLE RAILROAD COMPANY.

Action for Damages—Trial—Instructions—Weight of Evidence—Railroads—Negligence—Frightening Horses—Wantonness.

1. Where, in the trial of an action, the plaintiff has produced some, or more than a *scintilla* of, evidence in support of his contention, or there is conflicting evidence, it is the province of the jury to determine its weight and it would be improper to instruct the jury that if they believe the evidence the plaintiff cannot recover.
2. It is not error to charge that plaintiff cannot recover unless a locomotive engineer blew a whistle negligently, wantonly or maliciously, for the purpose of frightening plaintiff's horses, inasmuch as the word "negligently" is used in such a connection as to clearly import such a degree of negligence as would be nearly akin to wantonness or malice.
3. An act is wantonly done when it is needless for any rightful purpose and manifests a reckless indifference to the rights and interests of another.

ACTION for damages for the killing of the horses of plaintiff through the negligence and wanton conduct of defendants as Receivers of the Richmond and Danville Railroad Company, tried before *Bryan, J.*, and a jury, at Fall Term, 1896, of SWAIN Superior Court. There was a verdict for the plaintiff and defendants appealed. The facts appear in the opinion of the Court.

Mr. T. H. Cobb, for plaintiff.

Messrs. F. H. Busbee, A. B. Andrews, Jr., G. F. Bason, for defendant (appellant).

Douglas, J.: This is an action for damages for alleged injury sustained by killing horses of plaintiff alleged to have been frightened by unusual and unnecessary noise made by the engineer's sounding the whistle. The horses became unmanageable, plunged into the river and were drowned. The carriage was damaged and the harness ruined. The usual issues were submitted, and found for the plaintiff. The only exceptions appear to the charge as given and the failure to charge as requested by defendant, as follows:

"At the close of the evidence the defendant requested the Court in writing to give the following special instructions:

1. If the jury believes the evidence the plaintiff is not entitled to recover, and the answer to the first issue should be "No."

This instruction was refused, and the defendant excepted.

2. Unless the jury believes that the person who blew the whistle blew it wantonly or maliciously, for the purpose of frightening the horses, the plaintiff is not entitled to recover, and the answer to the first issue should be "No."

The Court modified this instruction by inserting the word "negligently" between the words "it" and "wantonly," and to this modification defendant excepted.

3. If the jury believe that the person who blew the whistle saw the team and saw that it was frightened, or knew that it was in danger of being frightened, still it was his right and his duty to blow the signal for the station, and unless he blew it in an unusual manner, or when it was not

necessary, or for the purpose of frightening the horses, the answer to the first issue should be "No."

This instruction was given.

The Court charged the jury as follows:

A railroad company is not liable when an injury results from horses being frightened by the noises or appearance of the train, when due and proper care in the management of the train is used. If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about in the loss of the horses, defendant would be liable.

Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

(a). An act is wantonly done, when it is needless for any rightful purpose and manifests a reckless indifference to the rights and interests of another.

Exception.—(b). And to so much of the charge as is between (a) and (b) defendant excepted.

Maliciously done means an act done with a desire or purpose to injure. A railroad is not liable for blowing whistle and ringing bell, while exercising this right in a lawful and reasonable manner, for injuries occasioned by horses, when driven upon the highway, taking fright at such noises.

Taking the charge as a whole, we see no substantial error. The first instruction asked could not properly have been given in view of the conflicting evidence. To do so, the Court would be compelled to pass upon the weight of the evidence, which is a question exclusively for the jury, as there was certainly more than a mere scintilla. *Hardison* v. *Railroad*, 120 N. C., 492; *Spruill* v. *Insurance Co.*, Ibid, 141, and cases therein cited.

The second exception is to the insertion of the word "negligently" before the word "wantonly" in the second prayer. There are so many degrees of negligence that the word used disjunctively without further explanation might mislead the jury, but taken in connection with the remainder of the charge it seems sufficiently clear to us, and was doubtless so to the jury, that the Court intended such a degree of gross negligence as would be nearly akin to wantonness or malice. In *Tillett* v. *Railroad,* 115 N. C., 662; *Morgan* v. *Railroad,* 98 N. C. 247, and *Doster* v. *Street Railway,* 117 N. C., 651, all cited and relied on by defendant's counsel, the word "negligence" is used as the proper term, leaving it to the Court to instruct the jury as to what would be negligence under the circumstances of each case.

We see no merit in the defendant's third exception, as the part of the charge to which the exception is taken is substantially adopted from the case of *State* v. *Brigman*, 94 N. C., 888, and the cases therein cited. "The illegal act is wanton, when it is needless for any rightful purpose, without adequate legal provocation, and manifests a reckless indifference to the interests and rights of others." *State* v. *Brigman, supra.* "Wantonness is action without regard to the rights of others." *Welch* v. *Durand*, 36 Conn., 182. "Wantonly means not having a reasonable cause." *Clark* v. *Haggins*, 103 E. C. L. Report, 543.

As the issues were found by the jury on competent evidence and under proper instructions, the judgment is affirmed.

Affirmed.

MRS. C. JAMES, Administratrix of W. A. James v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Action for Damages—Railroad—Corporation—Sale of Railroad Under Second Mortgage—Continued Liability of Railroad for Torts—Purchaser—New Corporation—Section 697 and 698 of The Code.

1. A mortgagor in possession of the mortgaged property with the consent of the mortgagee, after the day of payment has passed, is the owner of equity of redemption only but is liable for damages done to others in the use and enjoyment of the property.
2. A purchaser at a sale of property under a second mortgage subject to a first mortgage acquires only the equity of redemption but the mortgagor is not released from liability for the debt secured by the latter.
3. The sale of the Western North Carolina Railroad under a second mortgage and a conveyance thereunder subject to the first mortgage upon its franchise and corporate property did not extinguish the corporate existence of the Company nor release it from liability to the public for the manner in which it is operated.
4. The sale and conveyance of the property and franchises of the Western North Carolina Railroad Company made by a special Master to the Southern Railway Co., a foreign corporation, under a decree of foreclosure of a second mortgage, subject to an existing first mortgage, did not *ipso facto*, under Sections 697 and 698 of *The Code* make the purchaser a domestic corporation, nor did such sale and purchase make the Western North Carolina Railroad an integral part of the Southern Railway corporation.
5. In order that the sale of the franchise and property of a corporation under mortgage shall have the effect of a dissolution of such corporation as provided in Section 697 of *The Code*, another corporation must be provided, as contemplated in Section 1936 of *The Code*, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation.
6. It was neither the purpose nor effect of Sections 697 and 698 of *The Code* to create a foreign coporation in this State.
7. The effect of the sale of the Western North Carolina Railroad Company franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, was to place the purchaser (the Southern Railway Company) in the place of the

mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor, but the old corporation was not extinguished but is still in existence and liable for damages caused by the *mal*administration of its agent which liability can be enforced against the property which it allows the "Southern," to use

ACTION for damages for the negligent killing of plaintiff's intestate, tried before *Starbuck, J.*, and a jury at May Term, 1897, of ROWAN Superior Court. The facts are stated in the opinion. There was a verdict for the plaintiff for $15,000 but from the ruling of his Honor that the defendant was not liable thereon plaintiff appealed.

Messrs. L. S. Overman, A. C. Avery and *Long & Long*, for plaintiff (appellant).

Messrs. Charles Price, G. F. Bason and *F. H. Busbee*, for defendant.

FURCHES, J.: The Legislature of North Carolina in 1855 passed an Act, known as the charter of the "Western North Carolina Railroad." Under this charter a company was formed and organized, known as The Western North Carolina Railroad Company. This Company located and constructed a Railroad from Salisbury in the County of Rowan to Paint Rock, in the County of Madison, and also from Asheville in Buncombe County to Murphy in Cherokee County. This road was known and operated as The Western North Carolina Railroad from the date of its construction until April, 1884, when The Western North Carolina Railroad Company leased the same to a corporation known as the "Richmond & Danville Railroad Company" for the term of ninety-nine years. Upon the execution of this lease, this last named Company went into possession and control of said road, and ran and operated the same until 1894. On the first day of September, 1884, the "Western North Carolina Railroad Company" executed a mortgage to "The Central Trust Company of New York" in which it conveyed all its property of every kind, including its franchise, which mortgage is not yet due. And on the second day of September, the said Western North Carolina Railroad Company made and executed a second mortgage to said Central Trust Company, and again conveyed all its property of every kind, including its franchise, but subject to the first mortgage mentioned and the payment of the bonds therein secured.

The bonds secured by this second mortgage being due and not being paid, The Central Trust Company brought suit in the Circuit Court for the Western District of North Carolina for a foreclosure and sale under the second mortgage. Under the proceedings in this suit a decree of foreclosure was had, subject to the lien of the first mortgage which had not been satisfied, an order of sale was made, a special master appointed to make the sale, which he did in August 1894, when the "Southern Railway Company," a corporation organized and existing under the laws of the State of Virginia, became the last and highest bidder. This sale was duly reported to said Court and confirmed; the said Southern Railway Company declared to be the purchaser; and the special master was directed to make a deed to the purchaser, the Southern Railway Company, conveying to it all the property of every description, including the franchise of the Western North Carolina Railroad Company subject to the lien of the first mortgage, which he did on the 22nd of August 1894. And the said Southern Railway Company at once went into possession and control of the said Western North Carolina Railroad property, and has been running and operating the same ever since under said purchase and deed.

The intestate of the plaintiff was an employee of the Southern Railway Company and was killed in 1896. There were four issues submitted to the jury:

1. Was the death of plaintiff's intestate caused by the

negligence of a fellow servant, as the sole proximate cause? Ans. No.

2. Was the death of plaintiff's intestate proximately caused by the negligence of the Southern Railway Company, which at the time was operating the road? Ans. Yes.

3. Is the defendant answerable for the negligence of the Southern Railway Company in causing the death of plaintiff's intestate? Ans. No.

4. What damage is the plaintiff entitled to recover? Ans. $15,000.

The third issue was withdrawn from the jury and answered by the Court as a question of law, and the ruling upon this issue constitutes the only question presented by this appeal for our consideration. The correctness of this ruling, it seems to us, involves or may involve the consideration of two questions:

Did the Western North Carolina Railroad corporation become extinct? And did the Southern Railway Company as a *corporation* succeed the Western North Carolina Railroad Company as a *corporation* upon the completion of the sale under the foreclosure proceedings and execution of the deed by the special master?

By the laws of this State, the mortgagee is the owner of the legal estate in the mortgaged property, and the mortgagor is the equitable owner with the right to pay the debt and discharge the mortgage. But after the day of payment has passed, he then has only the equity of redemption. *Parker* v. *Beasley*, 116 N. C., 1; *McIver* v. *Smith*, 118 N. C., 73. But the mortgagor in possession of the mortgaged property by the consent of the mortgagee, is considered to be so far the owner as to be entitled to the rents, tolls and perceptions of the mortgaged property without being liable to account, and is liable for damage wrongfully done to others in its use and enjoyment. *Dunn* v. *Tillery*, 79 N. C., 497 cited and approved in *Killebrew* v. *Hines*, 104 N. C., on page 188.

At the time the second mortgage was executed, the legal title to this property was in the "Central Trust Company of New York," having been conveyed to this company by the first mortgage, and the Western North Carolina Railroad Company had only the equity of redemption when it executed the second mortgage, and only the equity of redemption at the time of said sale. And as the Southern Railway Company claims under the second mortgage, it can have no more, no greater, estate than The Western North Carolina Railroad Company had at the date of the sale under the second mortgage.

By the sale of the special master under the second mortgage, the purchase thereunder and the express assumption of the first mortgage debt binds the purchaser, the "Southern Railway Company" for this debt. And as between the Southern and the Western, it makes the "Southern" the principal and the "Western" its surety. But this does not release the "Western" nor the property mortgaged to pay this debt, from liability. And this, it seems to us, would be a reason for not considering the Western North Carolina Railroad Company as extinct. *Woodcock* v. *Bostic*, 118 N. C., 823; *Keller* v. *Ashbord*, 133 U. S., 610.

The franchise and the corporate property must go together. They cannot be separated. There cannot be a corporation without a franchise. *Gooch* v. *McGee*, 83 N. C., 59. This rule does not interfere while the mortgagor is in possession with his operating the road by the consent of the mortgagee, because he is considered the owner, and is the owner for certain purposes, and is responsible to the public for the manner in which it is run. *Dunn* v. *Tillery* and *Killebrew* v. *Hines*, *supra*.

But how is it if the contention of the "Southern" is true?

The first mortgage conveys everything, including the franchise. The Southern says the "Western" was authorized to make this mortgage, and to convey the franchise. But to enable it to have a corporate existence, it must also have a franchise. There cannot be two independent corporations dependent upon one franchise. Nor can the "Southern" be a corporation built upon the franchise granted to the "Western," while that franchise is owned by the Central Trust Company of New York. *Gooch* v. *McGee*, *supra.*

It is contended that, under Sections 697 and 698 of *The Code*, the sale and conveyance by the special master to the "Southern Railway Company", *ipso facto*, made the Southern a corporation. This does not seem to us to be so. If it is a corporation, is it a domestic or foreign corporation? The Southern is a foreign corporation existing under the laws of the State of Virginia. Virginia has no power to incorporate a railroad company in North Carolina as it has no power to grant a franchise in North Carolina. Nor does the purchase of this road make it an integral part of the "Southern Railway corporation." The property a railroad may own is not its corporation, any more than a horse a man may own is an integral part of the man who owns it. The corporation is an entity, resting upon a grant of the sovereign and clothed with some portion of the sovereignty. A railroad corporation is *quasi* public, and these extraordinary powers —franchises—are supposed to be granted for the benefit of the people as well as for the benefit of the corporators. It is presumed, by the acceptance of the franchise, that the corporators accept it subject to its burdens. This being so, it cannot be that the corporation could sell and transfer this franchise—this sovereignty—without the express permission of the sovereign (the Legislature) to do so. *Logan* v. *Railroad Co.*, 116 N. C., 940; *Railroad Co.* v. *Winans*, 17 How. 30.

It is claimed by the Southern that this express authority is given by Sections 697 and 698 of *The Code*. These

Sections were passed in 1872, and we think should be considered in connection with Section 701 which was passed in 1879, and Sections 1936 and 2005 referred to in Section 701.

If this be the correct reading of these Sections of *The Code*, it would seem that while Section 697 does say that these facts, *ipso facto*, dissolved the corporation, another corporation must be provided, as in Section 1936 of *The Code*, to take its place before it is dissolved; that there must always be a corporation in existence liable to the public for the duties and obligations assumed by the grantee for the privileges conferred in the grant of the franchise; and that the old corporation must continue to exist until this is done; and that when the new corporation is formed it will be a domestic corporation. It cannot be that the Legislature ever intended, by this general legislation, to create a foreign corporation here, when it could not do so by positive and direct enactment. 119 N. C., 918, Judge Dick's opinion in *Bradley* v. *Railroad*, published in the Appendix.

By this view of the case, all the interests of the parties may be harmonized. The "Southern," the purchaser of the equity of redemption of the "Western," stands in the shoes of that company. The Southern is in effect the mortgagor in its relations to the "Central Trust Co. of New York," the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has the right to run and operate the same. But the old corporation, still in existence, is liable for damages caused by the *mal*-administration of the Southern, which it allows to run and operate the road. But the property of this road which the "Southern" is allowed to use will be held liable to the public for damages. *Charlotte* v. *Railroad Co.* 4 L. R. A., 135; *Brunswick Gas Co.* v. *United Gas Co.* 35 Am. St. Rep. 385, and note on p. 390.

It therefore follows that, in our opinion, the Court below erred in its ruling upon the third issue. This ruling is reversed, and judgment should be entered for the plaintiff according to the verdict of the jury.

Error and reversed.

MRS. C. JAMES, Administratrix of W. A. James v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

(DEFENDANT'S APPEAL.)

Action for Damages—Pleading Counter-Claim—Issues—Exceptions.

1. Though no counter-claim is pleaded the Court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion.
2. An exception to issues submitted or for failure to submit issues tendered can not be sustained where those submitted properly arose upon the pleadings.
3. An exception to the refusal of a prayer to instruct the jury that there is no evidence will not be considered in this Court where the case on appeal does not set out the evidence itself or contain a statement that there was no evidence, the presumption being that the trial Judge charged the jury correctly upon the evidence adduced on the trial.

This is the defendant's appeal in the case between the same parties, the plaintiff's appeal in which is reported *ante* on page 523. Defendant excepted to the permission granted to the plaintiff to file a reply to the answer which did not contain a counter-claim, also to the issues submitted. On the trial the defendant requested his Honor to instruct the jury that there was no evidence upon which the plaintiff could recover, but its case on appeal does not set out the evidence or contain the statement that there was no evidence.

Messrs. Lee S. Overman, A. C. Avery and *Long & Long*, for plaintiff.

Messrs. Charles Price, G. F. Bason and *F. H. Busbee*, for defendant (appellant).

CLARK, J.: The first exception is without merit. Though no counter-claim is pleaded, the Court can order a reply to be filed to matters of defence set up in the answer (*Code*, Sections 248, 277, *Fitzgerald* v. *Shelton*, 95 N. C., 519) and of course it can permit such reply to be filed as a matter of discretion.

The issues were those which properly arose upon the pleadings and the second exception can not be sustained.

The third exception is for refusal to grant several prayers for instructions that "there was no evidence," and that "according to the evidence" and the like. The defendant as appellant made out its statement of the "case on appeal" and the appellee accepted the same. When this is the fact, the Judge has nothing to do with the settling the case on appeal. In the case made out by the appellant, there is nothing whatever by which this Court can see that there was error in refusing the instructions asked. It is not sufficient that error is alleged, but it must appear that there was error, and unless the record or the case on appeal sets out matter from which the appellate Court can see that there was error, the presumption in favor of the correctness of the proceedings below universally obtains. Had the "case on appeal" set out the evidence on which the prayers "according to the evidence, &c.," were predicated, the Court could have passed upon the question whether there was error or not, but the appellant has not seen fit to put the evidence in the case, and we cannot presume error in the Judge. Had the appellant, in making up its statement of the case as to the matters on which it asked the Court to charge that "there was no evidence," set out all the evidence in the case or even upon that point, or stated as a fact that there was no evidence on that point, and this had been accepted by the appellee or on disagreement been so stated by the Judge, we could see whether or not there was insufficient evidence or no evidence. But, in the absence of the evidence or a statement that there was none, we can not presume there was none, and that the Judge charged the jury on a point when there was no evidence to support it. The presumption is the other way, unless it is affirmatively made to appear that there was no evidence. This has been held upon a very similar state of facts in *State* v. *Wilson*, at this Term and in many previous cases, among them, *Williams* v. *Whiting*, 92 N. C., 683, and *Walker* v. *Scott*, 106 N. C., 56.

In the absence of the evidence itself or of a statement that there was no evidence, a prayer to instruct the jury that there is none is without anything to support it in this Court, and the Judge below is presumed to have charged the jury correctly upon the evidence which was before him, but which the appellant did not think it worth his while to send up to us. If he had done so, we might still have approved his Honor's ruling. Certainly, the appellant is in no better condition by failing to do so, and it was not incumbent upon the appellee to fill up a *hiatus* in the appellant's case. If the appellant had any ground to complain of the charge, it has itself to blame for not presenting the case with the care an appeal is entitled to receive.

No error.

STATE v. HATTON PERRY.

Trial—Jury, Misconduct of—Unauthorized Hearing of Testimony—Visit of Jury to View Premises—Discretion of Trial Judge—New Trial.

1. In the absence of constitutional or statutory prohibition, it is in the discretion of a trial Judge to permit the jury to visit the scene of the *res gestae*, in criminal and civil cases, whenever such visit appears important for the elucidation of the evidence but such visit must be carefully guarded to prevent conversation with third parties and no evidence must be taken.
2. The granting or refusing a new trial rests in the discretion of the trial Judge when the circumstances are such as merely to put suspicion on a verdict by showing not that there was, but that there might have been undue influence brought to bear on the jury because there was opportunity; but, where the fact appears that undue influence was brought to bear on the jury or that they heard other evidence than that offered on the trial, this Court on appeal will, as a matter of law, grant a new trial whether the prisoner be convicted or acquitted, since there has been no trial in contemplation of law.
3. Where a jury, after the close of the evidence, visited the scene of the alleged crime and made enquiry of a passer by as to the identity of a certain house whose distance from the alleged *locus* was material, their conduct in thus "eliciting other evidence than that offered on the trial" is ground for a new trial whether their visit to the spot was by or without leave of the Court.

INDICTMENT for rape, tried at February Term, 1897, of BEAUFORT Superior Court, before *Bryan, J.*, and a jury. There was a verdict of guilty and after sentence of death was pronounced it came to the knowledge of the prisoner's counsel that the jury had visited the scene of the alleged rape while they were considering the case, without the knowledge or consent of the defendant, his counsel or the Court. An affidavit was filed by the prisoner to that effect and as a basis for a motion to set aside the verdict and for a new trial. His Honor found the following facts:

"The evidence in this case was closed on Saturday evening, the 20th of February. The jury was put in charge of a sworn officer. It was agreed by counsel on both sides that the jury might attend church on Sunday in a body and with the officer and also take walks for purpose of recreation. On Sunday afternoon the jury started out for a walk and, upon the suggestion of a juror, they walked down the railroad track to the red hill. After being there they went to view the surroundings and endeavor to locate the place where the rape was committed. There was some discussion as to the location of the place. They discussed the distance of Julia Williams' house and also that of Arthur Williams from the supposed scene of the rape with reference to the testimony at the trial. The officer in charge asked of a negro boy, at the suggestion of a juror, which was Anthony Perry's house and then pointed it out to the juror. One of the jurors put his foot on the stubble near the track and said "See! it makes no impression." A button was found and a juror jestingly said it might be one of Annie Smith's drawer buttons and it was discussed. At one time the jury were divided into groups. Three or four went off seventy-five or a hundred yards into the bushes temporarily. At no time were any of the jurors out of the view of the officer. A juror remarked that the house on top of the red hill was further than they thought it was. The jurors discussed the case while out there. The cedar spoken of in the testimony was seen. The railroad walked on is a thoroughfare. The place was not located, no one being present to identify it. The jury went to the scene of the rape without knowledge or consent of the Court or of the counsel engaged in the cause."

The evidence in the case was closed on Saturday evening, the visit of the jury to the locality was on Sunday and the argument of counsel and charge of the Court were on Monday.

His Honor refused to set aside the verdict and the defendant appealed.

Mr. Zeb V. Walser, Attorney General, and *Mr. J. H. Small,* for the State.

Mr. Chas. F. Warren, for the defendant (appellant).

CLARK, J.: In *Jenkins* v. *Railroad,* 110 N. C., 438, it is said: "The granting or refusal of the application for the jury to view the premises is a matter which rested in the sound discretion of the trial Judge. On some occasions it may be very useful and indeed almost necessary. . . The matter is one which must be left to the sound discretion of the trial Judge by whom such motion should only be granted when it shall seem clear to him that it is required in the interest of justice. But this practice is not to be encouraged." There are some States in which express statutes have been passed recognizing the right to grant a jury of view, but the authority inheres in the Courts in the investigation of truth to call in this and other aids, and rests in the discretion of the presiding Judge in the absence of constitutional or statutory prohibition. It is upon this principle that maps, photograph, expert evidence and the like have been admitted without express statutes authorizing it. In the celebrated trial of Professor Webster for the murder of Dr. Parkman, the jury was permitted to see the place where the crime was committed. *Com.* v. *Webster,* 5 Cush. (Mass.), 295; and this was also done on the trial of *Cluverius,* 81 Va., 787, in both instances there being no statute to authorize it. In *State* v. *Gooch,* 94 N. C., 987, and other cases it has been the recognized practice in this State. That excellent authority Wharton's Cr. Pl. and Practice (Section 707) says that the jury is permitted to visit the scene of the *res gestae* in criminal as well as civil cases, whenever such visit appears to the Court important for the elucidation of the evidence, but the visit must be jealously guarded to prevent conversation with third parties." This is the accepted modern doctrine and is founded on reason, as the object of a trial is to avail of every means to ascertain the truth of the issue, guarding against any thing that may muddy its source.

Considered as an authorized inspection of the *locus* in *quo*, and as such counsel argued it, there was error; for it appears that the jury interrogated a passer by as to the identity of a certain house whose distance from the scene of the alleged crime was material. The answer may or may not have been correct, and the query was based upon the assumption of a given spot as the immediate locality of the crime which may have been erroneous. While there is a difference between the authorities as to whether or not the prisoner must accompany the jury on their inspection of the premises, (Thompson on Trials, Sections 886, 887), all concur that evidence cannot be taken on such occasions, the object being merely to present to the jury the scene more vividly than is possible by the description of witnesses, so that the jury may with a better comprehension apply the evidence of the witnesses, which must be taken only in open Court and in the presence of the prisoner. Under the settled practice, showers are appointed by the Court to point out the localities merely, and no more, so the jury may apply the evidence received on the trial. Thompson, *supra*, Section 914; Bailey's Practice, 228; Archbold Practice, 407, (6th Eng. Ed.); *State* v. *Lopez*, 15 Nev., 407.

For a still stronger reason it was error for the jury to receive evidence on this occasion since in fact it was a view by the jury of the premises not under authority of the Court. It ought rather, therefore, to be considered as a charge of misconduct by the jury. There are decisions that the bare fact of the jury having visited the scene of a capital offence with whose trial they are charged, though made without leave of the Court, is not, *per se*, ground for a new trial but that some prejudice must appear. *People* v. *Hope*, 62 Cal., 291. But we are not called upon to pass on that point, as to which authorities conflict, for the interrogation of the passer by was misconduct calculated to prejudice the prisoner. *Hayward* v. *Knapp*, 22 Maine, 5; *State* v. *Lopez*, 15 Nev., 407, in the leading case of *State* v. *Tilghman*, 33 N. C., 513, it is held that where "on a trial, the circumstances are such, as merely to put suspicion on the verdict by showing not that there was, but that there might have been undue influence brought to bear on the jury, because there was opportunity, the granting or refusing a new trial rests in the discretion of the presiding Judge; but, if the fact be that undue influence was brought to bear on the Jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, or if they hear other evidence than that which was offered on the trial; in all such cases there has been no trial in contemplation of law, and the court on appeal will as a matter of law direct a new trial, whether the prisoner was acquitted or convicted." This has ever since been recognized as law and has been repeatedly cited and approved. The jury having, by their questions to the passer by, "elicited other evidence than that offered on the trial", it is ground for a new trial equally whether the visit of the jury to the spot was by leave of the Court or without such leave.

New trial.

STATE v. F. A. ADDINGTON.

Criminal Action for Purchasing Mill Logs Without Measurement—Jurisdiction—Mill Logs—Standing Timber.

1. Section 1 of Chapter 173, Acts of 1895, makes it unlawful "to sell or purchase mill-logs in quantities of 1 000 feet or more without their being inspected and measured by a sworn inspector" while Section 6 provides that "no mill owner or his employee shall have or cause to have mill-logs cut by the 1,000 feet without their being inspected and measured by a sworn inspector." The only penalty prescribed for a violation of the Act is in Section 8 which provides that "any violation of this Act either by seller or purchaser shall be fined not less than $20 nor more than $40 for each offense at the discretion of the Court; *Held,* (1) that the penalty prescribed by the Act applies only to the offense forbidden by Section 1 of which a Justice of the Peace has jurisdiction. (2) that as no penalty is prescribed for the violation of Section 6 it is a misdemeanor unlimited as to its punishment and, therefore, cognizable only in the Superior Court and not within the jurisdiction of a Justice of the Peace.
2. The term "mill logs" or "saw logs" does not include "standing timber" in the meaning of Section 1, Chapter 173, Acts of 1895, which makes it unlawful to sell or purchase mill logs in quantities of 1,000 feet or more without inspection and measurement by a sworn inspector.

CRIMINAL ACTION commenced before a Justice of the Peace and tried on appeal before *Bryan, J.*, and a jury at Spring Term, 1897, of BEAUFORT Superior Court, charging the defendant with violating Chapter 173, Acts of 1895, as amended by Chapter 200, Acts of 1897. In the Superior Court a special verdict was rendered and his Honor being of the opinion thereupon that the defendant was not guilty so adjudged and the State appealed.

Messrs. Zeb V. Walser, Attorney General and *B. B. Nicholson,* for the State (appellant).

Messrs. Charles F. Warren and *J. H. Small,* for defendant.

DOUGLAS, J.: This is a criminal action begun before a

Justice of the Peace, appealed to the Superior Court, and there tried on the original papers without indictment. The affidavit on which the warrant was issued charges that the defendant "did unlawfully and wilfully violate Statute of North Carolina of 1895 as amended by Statute of 1897, respecting the measuring of logs at said Baltimore and North Carolina Land & Lumber Company, by refusing to pay the regular sworn inspector for measuring certain logs as provided in aforesaid Statute, belonging to one Bryan Hardison" . . . . As the Statute, so indefinitely referred to, creates two distinct offences, neither of which is specifically set out in the affidavit or warrant, we must look to the special verdict to ascertain for which offence the defendant was actually tried. The Statute alleged to have been violated is Chapter 173 of the Public Laws of 1895 as amended and extended to Beaufort County by Chapter 200 of the Public Laws of 1897, the Sections herein referred to being in the original Act.

Section 1 provides, "That it shall be unlawful for any person to sell or purchase mill-logs in quantities of one thousand feet or more without their being inspected and measured by a sworn inspector."

Section 6 provides that "No mill owner or his employee shall have or cause to have mill-logs cut by the thousand feet without their being inspected and measured by a sworn inspector."

Section 8 provides that "Any violation of this Act *either by seller or purchaser shall be fined* not less than twenty nor more than forty dollars for each offence, at the discretion of the Court." This Section, the only one providing any penalty, being limited to the "seller or purchaser" can apply only to Section 1. Therefore Section 6 is left without any penalty so far as this Act is concerned but, being a matter of public grievance expressly forbidden by Statute, it becomes a misdemeanor as at common law punishable by indictment. Archbold Crim. Law, 2, Hawk., Chapter 25, Section 4; *State* v. *Parker*, 91 N. C., 650; *State* v. *Bloodworth*, 94 N. C., 918. As its punishment is therefore not limited to a fine of fifty dollars or imprisonment for thirty days, it is not within the jurisdiction of a Justice of the Peace. Const. of N. C., Art. IV, Section 27; *Code*, Section 892.

The special verdict finds, as the only act of sale or purchase, that the lumber company, of which the defendant was vice president, purchased *standing timber* from J. Bryan Hardison on the 29th day of November, 1896, and fully paid for it before the passage of the amendatory Act of March 2, 1897, which extended the operation of the Act to Beaufort County. This constitutes no offence whatever, as the Act being criminal can not operate *ex post facto*; and, moreover, "standing timber" is not referred to in the Act. The word "log" has a definite significance, and means the trunk of a tree cut down and stripped of its branches. A saw-log means a log cut into a length suitable for being sawed into lumber. A tree standing in the woods can no more be called a saw-log because it is capable of being cut into a saw-log, than it can properly be called a plank or a shingle from its capability of being sawed into those articles.

If, by any stretch of interpretation, "saw-logs" could be construed to include "standing timber", then the offence would be complete at the instant the purchase or sale was completed without measurement. How the standing timber of an extensive swamp can be measured "by the superficial or board measure" we cannot comprehend. No law could stand such a construction.

The only offence of which the defendant can be guilty under the special verdict, if guilty at all, is that of having mill-logs cut by the thousand feet in violation of Section 6. This offence we have seen is not within the jurisdiction of a Justice of the Peace.

We have not overlooked the other difficult and interesting questions raised in this case, but we do not feel at liberty to ignore the vital question of jurisdiction so clearly stated and ably argued by the learned counsel, simply to express an opinion upon matters not properly before us.

STATE v. F. A. ADDINGTON et al.

Criminal Action for Purchasing Mill Logs Without Inspection and Measurement—Jurisdiction—Standing Timber—Mill Logs.

Section 1 of Chapter 173, Acts of 1895, makes it unlawful to purchase or sell mill logs in quantities of 1,000 feet or more without inspection and measurement by a sworn inspector while Section 6 forbids any mill owner or his employee to have mill logs cut by the 1,000 feet without such inspection and measurement. Section 8 imposes a penalty, for each violation of the Act, of not less than $20 and not more than $40, at the discretion of the Court. Defendant was charged before a Justice of the Peace with a violation of the Act and a special verdict of a jury on trial of an appeal showed that he had bought standing timber to be afterward cut and sawed at his mills. *Held*: (1) That the jurisdiction of a Justice of the Peace under the Act, as shown in Section 8, is confined to the offence denounced by Section 1, the purchase and sale of logs—timber already severed from the land and on the market as personal property. (2) That defendant's offence was that denounced by Section 6 of which a Justice of the Peace has no jurisdiction as the punishment prescribed in Section 8 is not limited so as to bring it within such jurisdiction.

CRIMINAL ACTION commenced before a Justice of the Peace and tried before *Bryan, J.*, and a jury at Spring Term, 1897, of BEAUFORT Superior Court, charging the defendants with a violation of Chapter 173, Acts of 1895 as amended by Chapter 200, Acts of 1897. The jury rendered a special verdict, the substance of which is set out in the opinion, and his Honor being of the opinion that the defendant was not guilty so adjudged and the State appealed.

Messrs. Zeb V. Walser, Attorney General, and *B. B. Nicholson,* for the State (appellant).

Messrs. C. H. Warren and *J. H. Small,* for defendants.

MONTGOMERY, J.: The warrant of the Justice of the Peace, under which the defendant was arrested and tried, was issued upon affidavit in which it was stated "that T. A. Addington, vice president of The Baltimore and North Carolina Land & Lumber Company, did unlawfully and wilfully violate the Statute of North Carolina of 1895 as amended by Statute of 1897, respecting measuring of logs at said Baltimore and N. C. Land & Lumber Company by refusing to pay the regular sworn inspector for measuring certain logs—as provided in aforesaid Statutes, belonging to one Thomas Latham."

Chapter 173 of the Acts of 1895, which applied at the time of its ratification only to the Counties of Hyde, Pamlico and Onslow, and which by an Amendment made by the Acts of 1897, Chapter 200, was made to include the County of Beaufort, provides in its first Section: "That it shall be unlawful for any person to sell or purchase mill-logs in quantities of one thousand feet or more without their being inspected and measured by a sworn inspector." Section 6 of the same Act is in the following words: "No mill-owner or his employee shall have or cause to have mill-logs cut by the thousand feet without their being inspected and measured by a sworn inspector." The only punishment prescribed for a violation of the Act is set out in its eighth Section as follows: "Any violation of this Act either by seller or purchaser shall be fined not less than twenty nor more than forty dollars for each offence, at the discretion of the Court."

The defendant was convicted in the Court of the Justice of the Peace and a fine of twenty dollars imposed. Upon appeal the case was tried in the Superior Court of Beaufort

County, not upon a bill of indictment but upon the original papers in the proceedings before the justice.

It appears in the special verdict that the defendant Addington was the vice president of a corporation styled The Baltimore & North Carolina Land & Lumber Company, and that at the time of his arrest and trial the company was the owner of mills in Beaufort County and was there engaged in sawing and manufacturing lumber; that the defendant company had bought by the one thousand feet from Thomas Latham a lot of timber standing on a tract of land of Latham's, to be paid for when cut and removed and measured by the defendant; that after the timber had been cut and measured and delivered to the defendant, James J. Hodges, the inspector duly appointed under the Act, measured the logs and demanded his fees for the same, which the defendant refused to pay. If the warrant of the Justice of the Peace on its face was uncertain as to whether it charged a violation of Section 1 or of Section 6 of the Act, the special verdict makes it certain that the charge was based upon an alleged violation of Section 6, and that the defendant was tried on that charge, both in the Justice's Court and in the Superior Court. It is clear, therefore, that the Justice of the Peace did not have jurisdiction of the offence.

The magistrate's jurisdiction is confined, as appears in Section 8, to the case of seller and purchaser of logs—timber already severed from the land and on the market in the shape of personal property. The defendant had bought no logs in that sense. He was the purchaser of timber growing on the lands to be afterwards cut and sawed at the mills, and under Section 6 of the Act could only have been indicted for having mill logs cut by the one thousand feet without having them inspected and measured by a sworn inspector and paying his fees. Over such offence the Justice had no jurisdiction, as the punishment is not limited in that Section so as to bring the offence within the jurisdiction of a Justice of the Peace. The Superior Court would have had original jurisdiction if an indictment had been found, but such was not the case, the trial having been had on the original warrant issued by the Justice. The action must be dismissed.

Dismissed.

STATE v. WILLIS LEE.

Indictment for Murder—Trial—Evidence of Wife of Prisoner —Close Relations.

While the rule is that the law looks with suspicion upon the evidence of close relations and interested parties and it must be received with some degree of allowance, yet the rule does not reject or necessarily impeach it, and if, from the testimony or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness.

INDICTMENT for murder tried at February Term, 1897, of the Circuit Criminal Court of EDGECOMBE County before *Meares, J.* The defendant was convicted of murder in the first degree and appealed assigning various alleged errors for one of which, as set out in the opinion, a new trial is granted.

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. Gilliam & Gilliam and *R. O. Burton,* for defendant (appellant).

FAIRCLOTH, C. J.: The prisoner stands indicted for murder. Several exceptions were made, and we find one that requires us to order a new trial, and as the others may not be made again we do not pass upon them at present. The prisoner's wife was examined by him. In regard to her testimony the Court charged the jury: "They (the prisoner and wife) stand in the close relation of husband and wife, and the law is that, standing in close relation, there is a cloud of suspicion cast upon her testimony. At the same time the law does not say that a wife cannot swear to the truth. The law does not instruct you not to believe her, but it does caution you to scan her testimony very closely. . . The wife is a competent witness in behalf of her husband, but in view of the close relation between them and the cloud of suspicion cast upon her testimony, the law says the jury should scrutinize her evidence with great severity. If the jury reject the evidence of the wife, it would still devolve upon the State to furnish you with evidence to satisfy you beyond a reasonable doubt of the guilt of the prisoner." To this charge the prisoner excepted.

Besides the strong and significant language of his Honor, which we cannot approve, he failed to instruct the jury, as this Court has several times pointed out and required to be done, that, if they believe the discredited witness has sworn the truth, he is entitled to as full credit as any other witness. We will again state the rule: The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule, in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party; that such evidence must be taken with some degree of allowance and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. The omission in his Honor's charge, tested by this rule, was liable to mislead the jury into the impression or belief that the evidence of the wife is to be to some extent discredited, although the jury may think she is honest and has told the truth. *State* v. *Nash*, 30 N. C., 35; *State* v. *Boon*, 82 N. C., 637; *State* v. *Holloway*, 117 N. C., 730; *State* v. *Collins*, 118 N. C., 1203. We must therefore order a new trial.

New trial.

STATE v. ISHAM DURHAM.

Indictment for Trespass on Land—Burden of Proof—Claim of Right—Reasonable Ground of Belief—Destroyed Records—Evidence.

1. If upon the trial of an indictment for entry on land after being forbidden, such entry is shown or admitted, the burden is upon the defendant to show that he entered under a *bona fide* claim of right.
2. In such case, in addition to defendant's testimony that he believed he had a right to enter he must show that he had reasonable ground for such belief, and in the absence of such additional evidence it is the duty of the trial Judge to instruct the jury that, if they believe the evidence, the defendant is guilty.
3. In the trial of an indictment for entry upon land after being forbidden, the defendant testified that he believed he had a right to follow an old road across the land in question, but admitted that the road had been blocked for 10 or 11 years by wires put up for the purpose; *Held*, that the defendant's evidence of a *bona fide* belief, being unsustained by any evidence of a reasonable ground for such belief, was immaterial, and the trial Judge properly instructed the jury to find the defendant guilty if they believed the evidence.
4. Where the book of records of a board of township trustees is shown to have been destroyed by fire, the making of an order discontinuing a certain road can be proved by one of the trustees.

INDICTMENT under Section 1120 of *The Code* for entering upon land, after being forbidden, tried before *Robinson, J.*, and a jury at May Term, 1897, of VANCE Superior Court.

On the trial J. R. Young testified that he was the owner and in possession of the land, near Henderson, upon which the trespass was made; that he directed his tenant to notify defendant not to trespass on the premises; that there was a fence composed of two or three strands of wire across that part of the land where the trespass was committed—put up in 1887 or 1888; that the fence was taken down and pushed to one side and brush thrown out and a road made across the land and horses and vehicles drove across. On cross examination he stated that he had heard that formerly and before he owned the land a road ran across the land, but that in 1868 or 1869 it had been discontinued by the board of township trustees and that there has been no road across the land since he bought it in 1885.

Thomas Allen, for the state, testified: "I live on the farm in question. Lived there last year. In February or March of this year I notified Durham not to trespass on the land. The wire of Young's fence was down, and I nailed it up, and cut bushes and put in the road. Defendant pulled them out, and told me not to do it, as he was going to travel it until Lawyer Hicks told him to stop. I tended the land last year, and intended to do it this year. He asked my permission to go across it last year, and I granted it. Knew nothing about it until last year."

W. A. Belvin, for the state, testified: "I have lived near Henderson since 1855. Knew this road ever since. It was a public road. I was a member of the board of township trustees and a justice of the peace. About 1870 or '71 the township trustees discontinued the road, took the hands off, and assigned them to another road. (Defendant objected to this testimony for the reason that the Statute directed, and still does, the mode by which a public road might be discontinued, and it is not competent to show that it was discontinued in any other way, except by nonuser for thirty years. Objection overruled. Defendant excepted.)" The witness stated that it had not been used or worked for 27 years. On cross-examination he stated: "I have not been been a justice or road supervisor all the time. If this road had had an overseer, or been worked, I would have known it. We did not stop it up; we simply took the hands off. I cannot say it has not been traveled by those who wanted to, in all that time; but it was discontinued as a public road by the township trustees. I do not remember that every land owner was notified, or that notice was posted; but I presume we did what was necessary. The book of the trustees containing this was burned in the Henderson fire in the spring of 1870. I never knew or heard that the county commissioners had anything to do with discontinuing it. The part of this road that crossed Young's land has been in cultivation. I saw it in cultivation last year."

There was other evidence as to the disuse of the old road.

Defendant, a witness in his own behalf, testified: "I am 53 years old. Have known this place 40 years. Have lived within two miles of it for 40, and at it 27, years. I remember when this road across Young's land was worked by an overseer and hands. This wire was put up 10 or 11 years ago. It came to the road and across it to a cedar, and then down the road. People at first went along beside the wire, and then turned across Buchanan's land; but he stopped up that way this year, which is the first time people passing in that direction have been stopped. Then I took down the wire at the cedar, and traveled along the old road." The Court here intimated that it would instruct the jury, upon the evidence, that the defendant was guilty. Defendant offered to show by this witness his *bona fide* belief in his right to travel the old road across prosecutor's land; and also by himself and many other witnesses that the public continued to go over this road till 1888, when a wire fence was put across the road by the prosecutor, and that thereafter the public went across the land of the prosecutor and Buchanan, an adjoining owner, in the same direction, until early in 1897, when the said paths were obstructed. The Court, upon objection by the State, held this evidence incompetent and immaterial. Defendant excepted.

The Court then charged the jury that upon all the evidence, if believed, they should find defendant guilty. Defendant excepted, upon the grounds: (1) That, it appearing from all the evidence that the locus in question was once a public road, it devolved upon the State to prove beyond a reasonable doubt that the right and easement of the public to go over it has been lost either by the method prescribed by law for discontinuing public roads, before 1876, with the concurrence of the township trustees, or else by a nonuser of the easement by the public for 30 years, neither of which was proved by the State; and the action of the township trustees, as testified to, in taking off the hands and ceasing to work the road, or even the order of the trustees discontinuing the road, if proved, would not, without the concurrence of the county commissioners, make, as provided by law, a discontinuance of the road. (2) The Court should have admitted the evidence offered by defendant of the *bona fides* of his claim of right to enter and go over the lands on that part thereof regarded by defendant as a public highway, and should have charged the jury as requested, that, if defendant entered the land under a *bona fide* claim of right, and went over it, he would not be guilty, when the same had ceased to be a public road. The jury returned a verdict of guilty and from the judgment thereon defendant appealed.

Mr. Zeb V. Walser, Attorney General, and *Mr. W. B. Shaw* for the State.

Mr. T. T. Hicks, for defendant (appellant.)

CLARK, J.: Upon an indictment for entry upon land after being forbidden (*Code*, Section 1120) when the entry, after being forbidden by the party in possession, is shown or admitted the burden devolves upon the defendant to show that he entered under a *bona fide* claim of right. It is not sufficient merely to testify that he believed he had a right to enter, for, if so, the Statute would be a nullity and incapable of enforcement, but he must show that he had reasonable ground for such belief. *State* v. *Glenn*, 118 N. C., 1194; *State* v. *Bryson*, 81 N. C., 595; *State* v. *Crawley*, 103 N. C., 353. If there is no evidence in that status of the case to show reasonable ground for such belief the Judge should instruct the jury that, if they believe the evidence, the defendant is guilty. *State* v. *Fisher*, 109 N. C., 817; *State* v. *Glenn, supra; State* v. *Calloway*, 119 N. C., 864.

The prohibition and the entry thereafter were in evidence and not denied. It was also in evidence that the former public road was discontinued in 1870 by the board of township trustees, who at that time were empowered to discontinue public highways. Acts 1868-'69, Chapter 185, Section 14. It being shown that the book of record of the board of township trustees had been destroyed by fire, the making of such order was properly shown by one of the said trustees. It was further in evidence by the defendant's own testimony that the road had been blocked for ten or eleven years by wires put up for that purpose.

The Judge therefore properly held that the defendant's evidence of a *bona fide* belief that he had a right to enter, being unsustained by any evidence of a reasonable ground for such belief, was immaterial, and that if the jury believed the evidence they should find the defendant guilty.

No error.

MONTGOMERY, J., did not sit on the hearing of this appeal.

STATE v. ROBERTSON.

Indictment for Seduction—Evidence—Impeachment of Witnesses—Trial—Expression of Opinion by Trial Judge.

1. It is competent for the State, in the trial of an indictment for seduction, to show that there was sexual intercourse between the parties subsequent to the first alleged act.
2. In the trial of an indictment for seduction one H. testified, for the defence, that he had sexual intercourse with the prosecutrix prior to the date of the alleged seduction. One U. for the State, testified that in a conversation with him the said H. had stated, in reply to a question, that he had never had illicit intercourse with the prosecutrix and that she was a lady. Another witness for the State was allowed to testify that he was near H. and U at the time of the conversation and that, hearing the name of the prosecutrix mentioned, he went near to the parties and heard H. say "It is not so. I always found her to be a lady" The latter testimony was objected to as fragmentary. *Held*, that the testimony was competent since it contained the whole matter in dispute and nothing that H. could have said could have explained it to mean anything other than that the prosecutrix was a virtuous woman, so far as he knew.
3. *Code*, Section 413, only prohibits the trial Judge from expressing an opinion upon those facts respecting which the parties take issue or dispute and, in order to constitute a violation of the Statute, remarks complained of must be shown to have been an expression of opinion on the facts and prejudicial to the party complaining of the same; but where, in the trial of an indictment for seduction, the prosecutrix in reply to a question, tearfully and energetically denied that she had ever had carnal intercourse with any one but the defendant and the crowd of bystanders laughed boisterously, and thereupon the trial Judge, in attempting to quell the disturbance, remarked, "If I could discover the infernal fiends who laugh in such

a manner, I would send them to jail for contempt," such remarks were not an expression of opinion on the facts involved in the prosecution.

INDICTMENT for seduction, tried before *Robinson, J.*, and a jury at July Term, 1897, of WAKE Superior Court. The defendant was convicted and appealed assigning as error the admission of certain evidence for the State and the remarks of his Honor to bystanders at the trial.

Mr. Zeb V. Walser, Attorney General, and *Messrs. Jones & Boykin,* for the State.

Messrs. Battle & Mordecai and *Argo & Snow,* for defendant (appellant).

FURCHES, J.: This is an indictment for seduction under promise to marry, under the Act of 1885, Chapter 248.

There are three exceptions presented by the record, two as to evidence and one as to remarks made by the Judge during the progress of the trial, in which it is alleged the Judge expressed an opinion as to the facts in the case prejudicial to the defendant.

The State asked Julia Hester, the prosecutrix, if subsequent to September 1893 there were other illicit acts committed by them of a carnal character. This was objected to by defendant but allowed by the Court and the witness answered in the affirmative that there had been other acts since the first.

This ruling of the Court is sustained by Wharton's Criminal Evidence, Section 35; *Sherwood* v. *Tilman,* 55 Penn. St. 77, and by a note in *Weaver* v. *Bechart,* 44 Am. Dec. 172, where *Sherwood* v. *Tilman,* is quoted with approval.

As the third exception is also as to evidence, we will consider it next. Thomas Hester testified that he had sexual intercourse with the prosecutrix before September 1893, the alleged date of the first intercourse with the defendant.

J. W. Upchurch testified in behalf of the State that he had a conversation with the witness, Thomas Hester, at his mill a few days before the trial in the civil action, in which he asked Thomas if it was true that he had sexual intercourse with Julia Hester, the prosecuting witness, when Thomas replied that it was not true; that he knew nothing of her, but that she was a lady.

There was evidence that Ray Parrish, Upchurch's miller, heard this conversation. Parrish was introduced by the State and testified: "I saw Thomas Hester at the mill the day he refers to and heard him talking; they were just outside. I heard Thomas Hester mention Julia Hester's name and I went to them immediately and heard Thomas Hester say, 'It is not so, I always found her to be a lady.'" To this evidence the defendant objected and upon it being allowed excepted, upon the ground that it was fragmentary.

We do not think so. It contained the whole matter in dispute, and if true proved that Thomas Hester had testified falsely, and nothing that Thomas could have said could have explained it to mean anything but that she was a virtuous woman, so far as he knew. There was no error in allowing this evidence. *Davis* v. *Smith*, 75 N. C., 115.

The second exception was urged with great earnestness and seems to have been principally relied upon by the defendant. It is an alleged violation of Section 413 of *The Code.* During the progress of the trial which seems to have lasted for more than a day, there had been considerable disorder on the part of some of the persons present at the trial. This disorder was loud outbursts of laughter, which the Court had undertaken each time to suppress. During the examination of the prosecutrix, Julia Hester, she was asked by the State if she had ever, at any time, permitted any man, other than the defendant, to have carnal knowledge of her; and when she replied, weepingly bitterly, in a trembling voice, "No sir, no sir," there was great and long continued laughter on the part of certain of the audience. 'The Court reproved them severely, saying 'Order, order; let the laughter stop at once. If I could discover the infernal fiends who laugh in such a manner, I would send them to jail for contempt.'' Without approving of the language in which this reprimand was administered, we do approve of the reprimand. The Judge could not have maintained his own self respect nor the respect of others for the Court over which he presided, if he had not reproved and reproved sharply such unseemly and disrespectful conduct. And, as it was his duty to keep order and to reprimand and to punish, if need be, parties engaged in such disreputable conduct, we are at a loss to see how the language used by the Judge could prejudice the defendant. It may be—we do not say that it did—that the sharp reproof administered by the Court prevented this clacking from having the effect that the defendant wished it to have. Whether this be so or not, it must be understood that order will be maintained in our Courts, and that causes civil or criminal must be tried by the evidence in the case and the law as pronounced by the Court. It has not come to this, that a Judge cannot maintain order in Court (even though he uses language in doing so that we do not approve) without laying himself liable to the charge of violating Section 413 of *The Code.* What he said was not to the witnesses, not to the counsel, not to the defendant, but to those creating a disorder. And how the defendant can come to the conclusion that he was prejudiced, we cannot see, unless he was expecting the disorder to benefit him in some way.

The Statute, Section 413 of *The Code*, only prohibits the Judge from expressing an opinion upon those facts respecting which the parties take issue or dispute. If he does this—expresses an opinion—in any manner or at any time during the trial, he violates the Statute, if it is done in such a manner as to prejudice either party. But it devolves upon the party complaining to show that the Court has in some way expressed an opinion on the facts and that it is prejudicial to him, or that it must be reasonably inferred that he was prejudiced thereby.

In *State* v. *Jones*, 67 N. C., 285, it is held that there must be some clear proof that an unfair effect was likely to be produced by the mode adopted, before it can be considered "as a violation" of the Statute, Section 413 of *The Code.*

In *State* v. *Browning*, 78 N. C., 555, it is said that "unless it appears with ordinary certainty that the rights of the prisoner have been in some way prejudiced by the remarks or conduct of the Court, it cannot be treated as error," under the Statute.

In *Williams* v. *Lumber Co.*, 118 N. C., 928, in discussing the rule under Section 413 of *The Code*, it is said the Court admitted a paper in evidence under the objection of the other side "remarking in a very pointed manner that the Court would allow the paper to be read and risk it; that when people contracted debts they must pay them." And this was held not to be a violation of Section 413. This case contains a full discussion of the learning on this subject, in which the most of the authorities are collected.

Therefore, tested by reason as well as by authority, we are of the opinion there was no error in law committed in the reprimand, nor in the manner of making it, prejudicial to the defendant. The judgment is affirmed.

Affirmed.

STATE v. W. H. REAMS.

Indictment for Carrying Concealed Weapons—Concealment—Intent—Question for Jury—Trial.

1. The gist of the offence of carrying a concealed weapon about one's person and off one's own premises, consists in the guilty intent to carry it concealed and not in the intent to use it.
2. The concealed possession of a weapon about one's person and off his own premises raises the presumption of guilt which may be rebutted, and whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury.
3. Where, in the trial of an indictment for carrying a concealed weapon, it appeared that the defendant had on no overcoat and had put his pistol, 10 or 11 inches long, in an upper outside coat pocket and that the handle and two inches of the breech were exposed to view and that when it was handed to him to take on a journey he said he did not intend to conceal it, it was error to instruct the jury that, if they believed from the evidence that any part of the pistol was concealed, that it could not be seen from the outside, they should find the defendant guilty.

Indictment for carrying concealed weapon, tried before *McIver, J.*, and a jury at September Term, 1897, of Nash Superior Court. The evidence showed that the defendant carried a pistol in the upper breast pocket; that the pistol was 10 or 12 inches long and that part of the handle and barrel protruded from the top of the pocket. The Judge charged the jury, who returned a verdict of guilty, that if they found from the evidence that any part of the weapon was concealed they should return a verdict of guilty. The defendant appealed assigning as error the above recited instruction.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. F. S. Spruill, for defendant (appellant).

Faircloth, C. J.: The Constitution, Article I, Section

24, says that, "The right of the people to keep and bear arms shall not be infringed. . . . . Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal Statutes against said practice." The legislature may then regulate the right to bear arms in a manner conducive to the public peace (*State* v. *Speller*, 86 N. C., 697) which it has done in Section 1005 of *The Code.*

The offence of carrying a concealed weapon about one's person and off his own premises consists in the guilty intent to carry it concealed and not upon the intent to use it; and the possession of the weapon raises the presumption of guilt, which presumption may be rebutted by the defendant. *State* v. *Dixon*, 114 N. C., 850, where the decisions are collected; *State* v. *Pigford*, 117 N. C., 748; *State* v. *Hinnant*, 120 N. C., 572.

State v. *Lilly*, 116 N. C., 1049, was much like the present. The proof was that the pistol was under the defendant's overcoat, and there was evidence that the pistol could be be seen. It was held that it was a matter for the jury, and not for the Judge, to determine whether the evidence was sufficient to rebut the presumption of concealment raised by the Statute, and whether or not the weapon was, in fact, concealed.

In the present case there was evidence that the defendant had on no overcoat, that he put his pistol in the left hand upper outside coat pocket, that it was 10 to 11 inches long, that two inches of the breech and the handle of the pistol was showing, and the balance of the pistol was in the pocket. When the pistol was handed to the defendant to go on a journey, he said he did not intend to conceal it.

His Honor told the jury that "If any part of the pistol was concealed, it is an indictable offence, and if the jury believe beyond a reasonable doubt that any part of it was concealed, that is, could not be seen from the outside, they should find the defendant guilty." This was error.

Carrying concealed weapons is a grievous evil and a constant menace to the good order and peace of society. It is cruel to the other party, who, when he engages in an altercation, is ignorant of the deadly force he encounters, and hence the *concealment* is the gist of the offence. It shows a deliberate purpose on the part of the offender to take his adversary at a deadly disadvantage.

Whether the weapon is concealed from the public, and whether the defendant has rebutted the presumption of guilt raised by the Statute when possession is shown, are questions of fact solely for the jury under proper instructions from the Court. If the weapon is partly exposed to public view, it would be difficult and unreasonable to say, as a legal conclusion, that it was concealed.

New trial.

STATE v. S. P. SATTERFIELD.

Indictment for Official Negligence—Officers—Criminal Negligence—Evidence—Trial.

1. Whether the evidence in the trial of an indictment was such as justified the jury in proceeding to a verdict—such evidence as would reasonably satisfy an impartial mind—is a preliminary question for this Court on appeal.

2. In the trial of an indictment against the defendant, who was principal Clerk of the House of Representatives of the General Assembly of 1895, for negligently permitting a bill, which had not been passed, to be delivered to the enrolling clerk to be enrolled, it appeared that on the day the General Assembly was about to adjourn there were 361 bills signed by the Speaker including the one in question; that defendant was the custodian of the bills and kept them in his office but had to leave his office frequently; that he had four or five assistant clerks and that members of the General Assembly and other persons had access to his office; that the bill in question was tabled

and so marked on the back and was seen in the hands of the defendant after being marked, and that the copyist who enrolled the bill did not receive it from the defendant and did not notice its endorsement and that defendant did not speak to her concerning the bill. Subsequently the bill was sent to the Secretary of State's office, with the signatures of the Speakers, and appeared upon the Statute books; *Held*, that the evidence was not sufficient to warrant a verdict of guilty. (Montgomery, J., dissents *arguendo*, in which Clark, J., joins.)

INDICTMENT for negligence in the discharge of the duties of the office of Principal Clerk of the House of Representatives of the General Assembly of North Carolina, tried before *McIver, J.*, and a jury at January Term, 1896, of WAKE Superior Court. There was a verdict of guilty and defendant moved to set aside the verdict as against the testimony for a new trial, &c. The motion was refused and defendant was adjudged to pay a fine of $250 and the costs, and appealed.

Mr. T. P. Devereux, for the State.
Mr. J. C. L. Harris, for defendant (appellant).

FAIRCLOTH, C. J.: The defendant is indicted as principal clerk of the House of Representatives of the General Assembly for causing and permitting to be delivered to the enrolling clerk a certain pretended Act of Assembly for enrollment. The Assembly was about to adjourn and on March 13, 1895, three hundred and sixty-one bills were signed by the Speaker, including this bill No. 1018. The defendant was custodian of all bills and kept them in his office not far from the Speaker's desk, and he had to leave his office frequently and attend to his duties in front of the Speaker. It appeared also that the defendant necessarily had four or five assistant clerks and that the members and other persons had access to the office; that, on that day, there was much crowd and confusion. It appears that the bill was tabled on the preceding evening and so marked on the back of it—and one witness testified that said bill and others, after the stamp "tabled" was on it, were seen in the hands of the defendant. On the same day a lady copyist for the enrolling clerk copied said bill and returned it to her principal. She testified that the defendant did not give her the bill and never spoke to her about it, and that she did not notice the back of the bill. The bill was soon afterwards found on the Statute book.

We have referred to this much of the evidence merely to show the situation, and the strongest aspect of it for the State. One witness testified that one of the assistant clerks had charge of all bills, after they were "sorted" and placed in pigeon holes in the desk of the office; that said assistant had the key to this desk where all bills were kept, and that he had custody of the bills. The defendant testified that he had no knowledge or information how the enrolling clerk came in possession of said bill. There were ten or twelve witnesses examined and we have carefully read the whole evidence, and we are of opinion that the defendant's motion in arrest ought to have been granted.

The duty of drawing the line between a scintilla and evidence fit for the jury is sometimes difficult and delicate, but it is important and the Court must assume the responsibility. It is a preliminary question for the Court who must find, not that there is absolutely no evidence, but that the evidence is such as would justify the jury in proceeding to a verdict—such evidence as will reasonably satisfy an impartial mind. *Commissioners* v. *Clark*. 94 U. S., 278; *Wittskowsky* v. *Wasson*, 71 N. C., 451; *Young* v. *Railroad*, 116 N. C., 932; *State* v. *Chancy*, 110 N. C., 507.

Error.

MONTGOMERY, J., dissenting: The defendant undertakes to defend himself by urging that as great a number as 361 bills were signed by the Speakers on the day when this one was signed; that there was a great rush and mighty confusion in the House that day; that he was frequently away from his office in the discharge of his duties, and that his assistant clerks, five or six in number, were not of his own choosing, but appointed for him by the House. But all of these things combined could not relieve him from the obligation of exercising reasonable care in performing his duty in connection with this particular bill. Indeed they should have made him more careful. If there had been a thousand bills instead of 361 and the House had been a Bedlam and the number of his clerks twice as great as they were, he could easily enough have taken this one bill out of the batch, after his attention was called to it, and called to it as a bill that had been tabled, and have placed it where it could not have been enrolled. Although others of his duties might have been impossible of performance on that day, owing to the matters he mentions, yet there could have been no excuse for a failure to make an effort to prevent this tabled bill from being enrolled after his attention had been called to it.

The indictment contained two counts, the first one charging that he permitted the enrollment negligently, and the second that he did it or had it done knowingly, wilfully and corruptly. He was convicted on the first count. The only question necessary to be decided is whether there was any sufficient evidence to be submitted to the jury on the question of negligence. I do not see how it admits of a doubt that there was such evidence. The following is the evidence: The bill, House bill 1018, had on its back, with others, this endorsement, "Tabled March 12, 1895," and, in fact, it had been tabled on that day. The journal of the House showed no entry that the bill had been tabled. Books were kept by the defendant, as principal clerk of the House, in which were kept, receipts of the enrolling clerk for all bills received by him from the principal clerk. This bill 1018 as appeared from these books was not receipted for either by title or number. R. L. Smith, a member of the House of that session, introduced the bill. Smith for the State testified that he requested the Speaker to place the bill before the House; that such course was taken and that the bill was tabled on March 11th. The witness further testified that, on the next day, the 12th of March, he saw the defendant in the possession of the tabled bill. The following is the exact testimony of the witness Smith on that point: "The next day, 12th March, I met Satterfield, Chief Clerk, just at the left of the Speaker's chair and he said he had one of my bills. *I asked him to let me see it and what he was going to do with it?* He showed me the bill, he said he was going to give it to the enrolling clerk. I told him it was tabled last night. He said he would go back and *see about it.* He turned back towards the desk of the principal clerk which is in front of the Speaker's chair. Since then he asked me where it was I met him, I told him and he admitted it." The defendant, after having been seen in the possession of the bill as described in the testimony of the witness Smith on his way to the enrolling clerk's office and after he had been cautioned about it, when he came upon the stand as a witness for himself, did not give out one word as to what he did with the bill after that time or as to whether he took any precautions to have it put in the possession of Mr. Lillington, the assistant clerk, whose duty it was to place the bills into proper apartments in a desk which he kept for that purpose, and which desk Lillington kept locked, keeping the key himself. By the testimony, Lillington was the custodian of the bills, such as had been passed and such as had been tabled, and the bill was never placed in his possession as far as the evidence discloses. The defendant, it is true, contradicted the witness Smith as to the nature of the conversation which they had when Smith discovered him going to the enrolling Clerk's office to have the tabled bill enrolled. The defendant was aware of the importance of that testimony. There was a conflict, but both sides of it was a matter for the consideration of the jury.

The evidence, including the defendant's own testimony, tended strongly to show that he did not use one particle of care to prevent the enrollment of this tabled bill.

I think the verdict of the jury and the judgment of the Court below ought to stand, for the verdict was justified by the evidence, and the judgment according to the law.

CLARK, J.: I concur in the dissenting opinion.

STATE v. GROVES.

Indictment for Murder—Trial—Evidence—Charge of Judge—Array of Facts—Waiver.

1. Inasmuch as the Statute (Section 413 of *The Code*) requires that the trial Judge "shall state in plain and correct manner the evidence given in the case and declare and explain the law arising thereon," a charge to the jury, in the trial of an indictment for murder, where the evidence of guilt is conflicting, is insufficient which only defines the different degrees of murder and contains no array of the facts or instruction as to the law applicable to such facts as the jury may find to be true from the evidence.
2. Where a defendant on trial for a capital offence pleads "not guilty," his consent that the Judge need not read over his notes of the testimony is not a waiver of his right to have the law applied to the facts in his case as the law requires shall be done.

INDICTMENT for murder, tried before *Adams, J.*, and a jury at March Term, 1897, of WAKE Superior Court. The defendant was convicted of murder in the second degree and appealed assigning error in the instructions to the jury.

The charge of his Honor was as follows: "The State is required to satisfy you beyond a reasonable doubt of the guilt of the prisoner. The prisoner is not required to show his innocence. The law presumes every person charged with crime to be innocent; and, if the State has so satisfied you, then your next inquiry is as to what degree of crime has been committed, whether murder in the first degree, murder in the second degree, or manslaughter. You are instructed that, under our Statute, the prisoner cannot be found guilty of murder in the first degree unless you are satisfied from the evidence, beyond a reasonable doubt, not only that he is guilty of feloniously killing the deceased, but it must further appear from the evidence beyond a reasonable doubt that such killing was done wilfully, deliberately, and with premeditation,—that is, that it was done intentionally and with prior deliberation; and unless all these appear from the evidence, beyond a reasonable doubt, the jury cannot find murder in the first degree. While the law requires, in order to constitute murder in the first degree, that the killing shall be wilful and premeditated, still it does not require that the wilful intent premeditated or deliberated shall exist for any length of time before the crime is committed. It is sufficient if there was a design and determination to kill, distinctly formed in the mind at any moment before or at the time the pistol shot was fired. And in this case, if you believe from the evidence, beyond a reasonable doubt, that the prisoner feloniously shot and killed deceased as charged in the indictment, and that, before or at the time the pistol was fired, the prisoner had formed in his mind the wilful, deliberate and premeditated purpose and design to take the life of the deceased, and that the pistol was shot in furtherance of that design and purpose, and death ensued from the effect of said shot, that he would be guilty of murder in the first degree. To constitute murder in the first degree, there must have been an unlawful killing, done purposely and with premeditation and malice. If a person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it, before he performed the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time which constitutes the distinction between murder in the first degree and murder in the second degree. Deliberation and premeditation are essential in order to constitute murder in the first degree, it matters not how short the time, if the party has turned it over in his mind, and weighed and deliberated upon it. Murder in the second degree is the felonious killing of a person with malice aforethought, but without deliberation and premeditation. Manslaughter is any unlawful killing without malice aforethought, as when one kills another in a fight arising in a sudden quarrel in the heat of passion. Defendant admits that he shot the deceased. That being so, malice is presumed from the use of the deadly weapon; and if you believe that the prisoner shot the deceased as he says he did, and deceased died from the effect of the wound caused by said pistol shot, and that he premeditated and deliberated by turning the matter over in his mind before the fatal shot was fired, then you should find him guilty of murder in the first degree, unless you find he shot in self-defence. If you find that the prisoner had not deliberated and premeditated,—that is, thought of the killing before hand,—and had not formed a specific intent to kill the deceased before he shot, then you should find him guilty of murder in the second degree, unless the defendant has satisfied you that he acted from the impulse of heat and passion or that he shot in self-defence. But, if you should find that defendant acted from the impulse of heat and passion, and that the deceased and defendant were quarreling with each other, and defendant shot from impulse and passion, and deceased died from the effect of said wound made by the pistol shot, then you should find him guilty of manslaughter, unless you are satisfied the prisoner shot in self-defence. The fact that deceased may have cursed or insulted the defendant did not give the defendant a right to shoot deceased; and if the prisoner shot deceased for the purpose of resenting an insult, and death resulted from said shot, the prisoner would, at least, be guilty of manslaughter, unless you find he shot in self-defence. The plea of self-defence being relied on, it is incumbent on the defendant to show to your satisfaction that he acted in his necessary self-defence. The burden in this respect is on the prisoner. A person has a right to defend himself from death or serious bodily harm when attacked, but in that case has no right to use more force than is necessary in his protection; but, if an attack on a person is not of such violence as to threaten serious bodily harm, his resistance must stop short of injury to life or limb. When a person is assailed by another, and from the nature of the attack, viewed in the light of the assailant's known character for violence, and if the party assailed has reasonable ground to believe, and does believe, that the assailant intends presently to take his life or to do him some great bodily harm, he will be justified in killing his assailant, provided he has not previously brought on the assault, and provided the circumstances are such that the extreme measure would seem to the comprehension of a reasonable man necessary in his situation to prevent the threatened injury, not the bare belief on the part of the accused that he was in danger of death or great bodily harm at the time he resorted to the force which will excuse or justify him, but he must show to your satisfaction that he had reasonable grounds for such apprehension; at least, he must raise a reasonable doubt in your minds as to whether he had not such reasonable grounds. It is for the jury, and not the prisoner, to judge of the reasonable grounds of apprehension."

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. Jones & Boykin and *J. C. L. Harris,* for defendant (appellant).

FAIRCLOTH, C. J.: The defendant was indicted for murder, was convicted of murder in the second degree and appealed, assigning several exceptions in apt time. We are required to order a new trial on one exception and that renders it unnecessary to consider the other exceptions. That exception was to his Honor's charge to the jury. Several witnesses were examined as to the facts and to character. There was conflicting evidence as to the circumstances, the place, the manner of the killing and the mutual provocations. His Honor told the jury what constituted murder, murder in the second degree, manslaughter and self defence in general terms; and, without committing ourselves to his definitions, in several respects we find the charge defective. It fails to state the contentions of the parties, and fails to tell the jury if they find the facts according to either of the contentions, what the law is applicable thereto. There is no array of the fact or facts, which the evidence tends to prove, if believed by the jury, and the jury is left to apply the law to the facts as they may find them without any aid from the Court. The charge deals in general expressions in technical language, without any array of the facts, or different parts of the evidence, and it is hardly possible for the jury to apply such language to the facts without assistance from the Court. The law does not leave them in such a helpless condition. The law requires that the Judge "shall state in plain and correct manner the evidence given in the case, and declare and explain the law arising thereon" (*Code*, Section 413) and the defendant's exception is that he failed to do so, and that he failed to state the issues arising out of the evidence, upon which they were compelled to pass; also that he failed to instruct them as to the law applicable to such facts as they might find to be true from the evidence.

In *State* v. *Dunlop*, 65 N. C., 288, it was held that when a prayer for instruction assumes facts to be in proof, and in the opinion of the Judge there is no evidence tending to prove them, he ought to say so and disembarrass the jury of the assumed facts and of the law predicated thereon. But if there be evidence tending to prove the assumed facts, the Judge should tell the jury distinctly what the law is, if they find the assumed state of facts to be true, and so as to every such state of facts arising out of the different aspects of the evidence.

The subject is so thoroughly discussed in the above case and in *State* v. *Jones*, 87 N. C., 547, a similar case, that we deem it useless to cite other authorities or to make further comment. It was agreed that his Honor "need not read over his notes of the testimony" and he did not do so. This does not change the matter. His Honor was not required to read over the details of the evidence, nor to repeat it in detail to the jury, but he must direct their attention to the principal questions they have to try and give them the law bearing thereon.

A defendant may plead guilty if he likes, and waive many formalities in the course of the trial, but when he has plead 'not guilty' in a capital case, and is in the hands of the jury and Court, his consent that the Judge need not read over his notes cannot be taken as a waiver of his right to have the law applied to the facts in his case, as the law requires shall be done. The case goes back for trial *de novo* for the offence charged in the bill of indictment. *State* v. *Craine,* 120 N. C., 601.

New trial.

STATE v. S. BRYANT.

Indictment for Failure to Pay Taxes—Taxes, When Payable.

Under Section 35, Chapter 169 (Tax Machinery Act) of Laws of 1897, the tax payer may pay his taxes at any time before the last day of November without incurring any penalty or punishment, but under Section 36 the Sheriff, whenever justified reasonably by the facts in the case, may levy and collect by distress at any time after the first day of November.

INDICTMENT for failure to pay taxes, tried before *Robinson, J.*, and a jury at Fall Term, 1897, of JOHNSTON Superior Court.

The jury rendered the following special verdict:

"That defendant is a resident of this County. That on the 16th day of November, 1897, the defendant was liable for a poll tax in the sum of two dollars and a property tax in the sum of ninety-one cents and that he failed to pay the same. If, therefore, the Court shall adjudge the defendant guilty upon this finding of facts then the jury so find for their verdict.

And if the Court shall thereupon adjudge the defendant not guilty then the jury so find." The Court thereupon adjudged the defendant not guilty, whereupon the Solicitor for the State appealed.

Mr. Zeb V. Walser, Attorney General, for the State.

No counsel, *contra.*

FAIRCLOTH, C. J.: The indictment is for failing to pay taxes and was found to be a true bill at a term of Court held November 16, 1897. By agreement of counsel for the State and the defendant the jury returned the following special verdict: "That on the 16th day of November, 1897, the defendant was liable for a poll tax in the sum of $2 and a property tax in the sum of 91 cents and that he failed to pay the same." His Honor upon these facts held that the defendant was not guilty and the Solicitor for the State appealed.

The Revenue Act of 1897, Chapter 168, Section 52, requires the Sheriff of each County to inquire and report to the Judge, at each term of the criminal Court held in the County, following the time when the taxes should have been paid, as to whether they have been paid and to make out a list of all delinquents, and the Judge is required to submit the list to the Solicitor for prosecution in the manner provided in the next Section. Section 53 declares that persons liable for taxes, provided for in this Act and the Machinery Act, and failing to pay the same as provided by law, shall be guilty of a misdemeanor. The Machinery Act of 1897, Chapter 169, Section 35, declares that "all taxes shall be due on the first Monday in September in each year." Section 36 declares that "the Sheriff or his deputy or tax collector shall attend at the Court house or his office in the County town during the months of September and November for the purpose of receiving taxes. He shall also in like manner attend at least one day during the month of October at some one or more places in each township, of which 15 days notice shall be given by advertisement, etc., *provided* that nothing in this Section shall be construed to prevent the collecting officer from levying and selling after the first day of November, but he shall not sell before that day."

The amount of tax, subject to the Constitution, time when due, when collectible, and the procedure, are matters regulated by the Legislature, usually every two years, for raising revenue for the State. Different Sections of these Revenue Acts are frequently and apparently in conflict with each other and are sometimes found to be so. When these apparent conflicts can be reconciled, consistent with the language and intent of the Legislature, we think such construction should be given to such legislation. In the present case it is clear that taxes are due September 1, and the collector shall attend the precincts until the last of November to receive taxes, and he may levy and collect after November 1.

We think the tax payer may pay his taxes at any time before the last of November, at least, without incurring any penalty or punishment, and that the Sheriffs under the proviso in Section 36 may levy and collect, whenever justified reasonably by the facts in the case; for instance, if the tax payer should attempt to remove to distant parts, or attempt to secrete or remove his property and thus evade payment. In such cases, it is reasonable that the tax collector should have authority to collect at any time after November 1. True, the tax payer may pay at any time before or after the day on which he is required to do so, but if he is not allowed until the last day of November there is no reason why the tax collector should attend at the precincts and be required to do so until that day. The law requires payment of taxes, but we do not see that the Legislature intended to adopt any harsh rule. In passing Revenue Laws the Legislature takes notice of the habits of the people and of the season in which they can pay without sacrifices.

In the present case, it does not appear that the defendant has refused to pay or that the collector has yet demanded payment, nor that the tax is in danger of being lost. We must therefore sustain the conclusion of his Honor.

Affirmed.

STATE v. PETER CAMERON.

Practice—Appeal—Criminal Cases—Statement of Case on Appeal—Solicitor for the State—Counsel for Prosecution.

1. Appeals in criminal cases are regulated by the same rules as govern those in civil cases and must be begun and perfected according to the requirements of law on that subject.
2 The statement of case on appeal in a criminal case must be submitted to the State's Solicitor for the District where the case is tried for acceptance or objection.
3. Counsel for a private prosecutor, who aids the Solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal.
4. Where the State's Solicitor is not present at the trial of a criminal prosecution, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the Court, and, in such case, the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal.

INDICTMENT tried before *McIver, J.*, and a jury at Fall Term, 1896, of CHATHAM Superior Court. The defendant was convicted, and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
Messrs. Murchison & Calvert, for defendant (appellant).

MONTGOMERY, J.: Appeals are allowed from the Superior Courts to the Supreme Court in all cases where final judgment is pronounced, but they must be begun and perfected according to the requirements of the law on that subject. The law which regulates the matter of appeals is the same in both civil and criminal cases. As a first step, the appellant, within the time allowed must make out a statement of the case on appeal, and tender the same to the respondent. In criminal appeals, the respondent is the State represented by the Solicitor of the District in which the case is tried. In the matter before us we find upon examination of the statement of the case on appeal that it was neither submitted to the Solicitor and accepted by him, nor made out by the Judge as upon objection made by the Solicitor to the case of the appellant. The case was prepared by the attorney of the appellant and accepted by the attorney who appeared on the trial for the prosecutrix, and who subscribed himself as the representative of the Solicitor. After a thorough consideration we are of the opinion that the attorney who undertook for the State to accept the case of the appellant had no authority, that we can see, to do so. The Solicitor represents the State in criminal prosecutions and the statement of cases on appeal in such cases should be submitted to him for acceptance or objection. If that officer should not be present during the trial, then the case on appeal should be submitted to the attorney who represents the Solicitor and who is prosecuting for the State with the sanction and approval of the Court, and the appointment by the Solicitor of his representative must be made a matter of record, and appear in the transcript to this Court that we may see and know that in a matter of such importance the State is represented by the Solicitor or by an attorney who has been appointed by him, and authorized by the Court to perform the duties of the Solicitor. An attorney who simply appears for a private prosecutor only aids the State in the trial, but does not represent the State in the sense of one of its sworn officers.

This matter is remanded to the Court below with instructions to the Clerk thereof to notify, at once, the appellant and his attorney of the opinion of this Court to the end that he may, if he so desires, tender a statement of the case on appeal to the Solicitor of the 5th Judicial District. The tender of the case to be made to the Solicitor within thirty days after notification to the defendant and his counsel.

Remanded.

STATE v. LOCKETT DANIEL.

Indictment for Burning Stable—Arson—Indictment, Sufficiency of—Possession of Building.

1. In an indictment under Sections 985 (6) of *The Code* directed against setting fire to certain kinds of buildings "whether such buildings shall then be in possession of the offender or in the possession of any other person," it is not necessary to allege that the burned building was "in possession of" some person named.
2. This Court renders judgment upon an inspection of the whole record and must, therefore, be satisfied of the sufficiency of such record. (Section 957 of *The Code.*)
3 The attention of Clerks of the Superior Court is called to the necessity of observing the legal requirements in respect to making up transcripts of record on appeal in criminal cases so as to show the organization of the Court, that it was held at the time and place specified by law, that a grand jury was drawn, sworn and charged and presented the indictment set forth in the transcript.

INDICTMENT under Sections 985 (6) (as amended by Chapter 42, Acts of 1885) for burning a stable, tried before *Allen, J.*, and a jury at Spring Term, 1897, of GRANVILLE Superior Court.

The indictment was as follows: "The jurors for the State, upon their oaths, present that Lockett Daniel, late of the County of Granville, on the 5th day of April, 1897, with force and arms, at and in the County aforesaid, a certain building, *to-wit:* a stable, then and there situate, the property of Elizabeth F. Sattherwhite and others, wantonly, wilfully, and feloniously did set fire to and burn, against the form of the Statute in such case made and provided, and against the peace and dignity of the State." The jury found the defendant guilty, and he moved in arrest of judgment, on the ground that the indictment contained no criminal charge against him. The motion was denied. It was ordered and adjudged that defendant be confined in the penitentiary for seven years, from which judgment defendant appealed.

Mr. Zeb V. Walser, Attorney General, and *Messrs. Fuller & Biggs,* for the State.

Messrs. Edwards & Royster, for defendant (appellant).

CLARK, J.: The transcript on appeal was defective. It did not show the organization of the Court, nor that it was held at the court house, nor at the time and place specified by law, nor that a grand jury was drawn, sworn and charged, and that they presented the indictment which is set forth in the transcript. The attention of the Clerks of the Superior Courts is again called to the legal requirements in this respect, as stated in *State* v. *Butts,* 91 N. C., 524, and especially to what is said on page 526. The Court here refused to grant the motion to dismiss the appeal on that ground in a criminal case raising a serious question, though it has allowed the motion in felonies (*State* v. *May,* 118 N. C., 1204), as well as in misdemeanors (*State* v. *Watson,* 104 N. C., 735). The appellant, however, as well as the Clerk, has been derelict in not sending up a proper transcript; and the Court would not permit the appellant a continuance of the cause for his own neglect, but sent down *ex mero motu* an *instanter certiorari* to cure the defects in the transcript of the record. The Court here renders judgment "upon inspection of the whole record" (*Code,* § 957,) and must see to its sufficiency. This is by no means the first defective record that has been sent up by this particular Clerk, nor is this the first *certiorari* that has been sent down to correct his shortcomings. By this time, he should be more conversant with his duties.

The prisoner is indicted for setting fire to a stable in Granville county, then and there situate, etc., "the property of Elizabeth F. Sattherwhite and others." He moved in arrest of judgment, because it was not charged, instead, that the stable was "in possession of" some person named. The offence is set out in *Code*, § 985 (6), which has been amended by Act 1885, c. 42, and it is not made a requisite thereby that the building set fire to shall be either "the property of" or "in possession of" any one. The constituent element of the offence is "the wilful and wanton" setting fire to any building of the kind therein named. The allegation of its being "the property of" A. is for purposes of identification only (10 Am. & Eng. Enc. Law, 595), to give the prisoner sufficient notice to prepare his defence, and enable him to plead former conviction or former acquittal to a second indictment for the same offence. An allegation that the stable was "in possession of" A. would have been sufficient, or so might other apt words, sufficient for identification of the building charged to have been set fire to. In statutory offences for burning, the property may be described as "belonging to," "the property of," "owned by," "in possession of," or simply "of," a person named. 1 McClain, Cr. Law, § 529. Hence, when the building is described in the indictment as "the property of" A., proof of possession is held sufficient evidence of ownership, for the "title of the property is not in issue." *State* v. *Jaynes*, 78 N. C., 504; *State* v. *Gailor*, 71 N. C., 88; *State* v. *Thompson*, 97 N. C., 496. And, for like reasons, when the building is charged as being "in possession of" A., the possession is not in issue. In *Wood-*

ford v. *People*, 62 N. Y., 126, Church, C. J., says: "Counsel argued that the allegation that the house was the property of or belonged to one person implied that it was in possession of another. I think the contrary presumption arises, and that, upon an allegation of ownership of a dwelling house in an indictment for arson, the legal presumption is that the person named is in possession of it, because the possessor is the owner of it for this purpose." This section (*Code*, § 985 [6]) is copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply "of" A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification. Though the allegation of either ownership or possession is not required by the Statute, and is for the purpose of identification merely, yet it must, of course, be proved in the person alleged in the indictment; but proof of ownership in A. would, as Chief Justice Church says, be sufficient evidence of possession, when identification is sought by alleging the building as "in possession of" A., just as proof of possession by A. would be sufficient (under *State* v. *Thompson*, *State* v. *Jaynes*, and *State* v. *Gailor*, *supra*) to sustain the allegation that the building is "the property of" A.

The provision in the Statute in question that it shall be an offence to set fire, wilfully and wantonly (as amended in 1885), to any of the buildings mentioned, "whether such buildings shall then be in possession of the offender or in possession of any other person," is no part of the description of the offence, but has reference to evidential matters which shall not defeat the conviction of the offender, making it immaterial whether he or some one else was in possession. Even in those cases in which it is necessary to charge the property or possession, it can be laid in "A. and another," or in "A. and others," as the case may be. *Code*, § 1188.

For a stronger reason, this is admissible when, as here, allegation neither of possession nor ownership is required, and such allegation is only for certainty and identification. Indeed, objection on this ground was not insisted on. The motion in arrest of judgment was properly overruled.

Affirmed.

STATE v. JANE BLACK.

Indictment for Selling Liquor on Sunday—Spy, Testimony of—Instructions.

1. Where, on the trial of an indictment for selling liquor on Sunday, a witness for the State testified that he went to the defendant's restaurant as a spy for the police officer and for the purpose of making a case against the defendant, it was not error to refuse an instruction that it would be unsafe to convict the defendant upon the unsupported testimony of such witness.
2. In such case, it was proper to charge the jury that, if they believed the witness was a spy, they should scrutinize his testimony and, after doing so, if they believed his testimony to be true, it made no difference as to what his motive was in going to defendant's restaurant or as to what his character was.

INDICTMENT for selling liquor on Sunday, tried before *Allen, J.*, and a jury at May Term, 1897, of GUILFORD Superior Court. The defendant was convicted and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. John N. Staples, for the defendant (appellant).

MONTGOMERY, J.: The indictment was for selling liquor on a Sunday. The defendant's counsel asked the Court to instruct the jury that it would be unsafe to convict the defendant upon the unsupported testimony of the witness

Perry, who had testified that he went to the defendant's restaurant as a spy and for the purpose of making a case against the defendant for the police officer. The Court declined to give the instruction in the form requested, but told the jury that if they believed the witness was a spy they should scrutinize his testimony and after doing so, if they were satisfied that his testimony was true it made no difference as to what was his motive in going to the house of the defendant, or what his character was.

We think there was no error in the refusal of his Honor to give the charge in the form requested by the defendant; and further that the instruction which he did give was correct, and was a sufficient caution to the jury as to the manner in which they should consider the testimony of the witness. *State* v. *Barber*, 113 N. C., 711.

No error.

STATE v. ISAAC HAIRSTON AND NELLIE LEE.

Indictment for Rape—Carnal Intercouse with Child Between Ten and Twelve Years of Age—Trial—Evidence—Character of Prosecutrix—Testimony, Admissibility of—Bible Entries as to Age.

1. While a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person; hence, defendants charged with rape cannot prove by their witness as to character of prosecutrix that such character was bad for virtue.
2. On the trial of an indictment for rape and for carnally knowing and abusing a female child between ten and twelve years of age, it was not error to refuse to permit a witness to state that prosecutrix had proposed to have sexual intercourse with him, when defendants did not propose to show that the witness had actually had intercourse with her.

3. Where, on the trial of a criminal action, the defendants, had, without the direction or sanction of the Court, caused the jailer to bring a prisoner in the Court room to testify, it was not error for the trial judge to order the witness to be sent back to jail after she had been examined for the defendants.

4. In the trial of an indictment for carnally knowing and abusing a female child between ten and twelve years of age, it was proper to allow her age to be shown by entries in a Bible where the witness states that he knew the handwriting of the child's mother, that the Bible had belonged to the mother and that the entries had been made by her and that she had been dead seven years.

5. It is not error to refuse to give instructions to the jury that were not asked for at or before the close of the evidence.

6. A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman.

7. Where an indictment where defendants were tried under an indictment containing two counts, one for rape and the other for abusing and carnally knowing a female child, and were convicted of the lesser offence, they cannot complain that the trial judge stated to the jury that the punishment for rape was death by hanging, and for the other offence, imprisonment in the penitentiary.

INDICTMENT containing two counts, one for rape and the other for abusing and carnally knowing a female child over ten and under fourteen years of age, (Chapter 295, Acts of 1895) tried before *Allen, J.*, and a jury at Spring Term, 1897, of GUILFORD Superior Court. The facts are stated in the opinion.

The fourth exception referred to in the opinion was to the evidence of Dr. Schenck who, for the purpose of showing penetration by the male defendant and also to the fact that the prosecutrix was under fourteen years of age, was allowed to testify that, upon examination of the prosecutrix, he had found the private parts torn and that there were no signs of womanly development or of arrival at the age of puberty which, he stated, was usually between thirteen and fifteen years of age.

The sixth exception referred to in the opinion was to the refusal of his Honor to give instructions that were not asked for until after the State's solicitor had begun his concluding argument to the jury.

The seventh exception was to the instruction that if the defendants made the prosecutrix drunk and the male defendant had sexual intercourse with her aided by the female defendant who forcibly held the prosecutrix, both would be guilty.

The defendants were convicted of the lesser offence charged in the indictment and were sentenced to imprisonment in the penitentiary, the male defendant for 15 years and the female defendant for 10 years. From this judgment the defendants appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. John N. Staples, for defendants (appellants).

FURCHES, J.: The defendants were indicted under two counts—one for rape, under Section 1101 of *The Code*, and the other for the lesser offence of abusing and carnally knowing one Nellie Harris, a female child over ten years of age and under fourteen, under Chapter 295 of the Acts of 1895. The evidence of the State tended to prove that the defendant Hairston, and the defendant Lee acting in concert, procured whiskey, got the prosecuting witness into a room, gave her whiskey until she was drunk, and that the defendant Lee helped to hold the prosecutrix while the defendant Hairston had sexual intercouse with her; that the prosecutrix was over ten and under fourteen years of age, that she was twelve years old. The defendants were convicted of the lesser offence, provided for in Chapter 295 of the Acts of 1895, and appealed, assigning the following errors:

The defendants introduced one Estelle Thomas who testified that she knew the general character of the prosecutrix and that it was bad. The defendants then asked the witness what was the character of the prosecutrix for virtue. Objected to by the State and excluded, and the defendants excepted. This exception cannot be sustained for two reasons: A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad. He may have to do this in justice to himself—in other words, to tell the truth. As for instance, the party spoken of had a general good character for some things, and a general bad character for other things; the witness could not truthfully say it was bad, nor that it was good, without qualification; or the opposite party may, on cross examination, test the witness by asking him as to what it is bad for, what it is good for, etc. *State* v. *Laxton*, 76 N. C., 216; *State* v. *Daniel*, 87 N. C., 507. Neither is it stated that the defendant expected to prove. It may be supposed what they expected to prove it bad. But this Court should not be left to doubt and speculate as to what the defendants expected to prove.

Second exception:—The defendants introduced a witness, Scott, and asked him if the prosecuting witness had not proposed to have sexual intercourse with him. This evidence was objected to by the State, and the Court asked the counsel for the defendants if he expected to follow this question by showing that Scott had intercouse with the prosecutrix, to which he answered that he did not, and the Court excluded this evidence. We see no error in this ruling.

Third exception: The defendants' counsel without permission of the Court had ordered the jailor to bring one Emma Bass, a prisoner then in the jail, to the Court House to be used as a witness; that after Emma had been examined by the defendants, the Court ordered the jailor to take her back to jail. While we cannot approve of the course taken by defendants' counsel to get this witness out of jail, we do approve the order of the Judge in sending her back to jail. This exception cannot be sustained.

Fourth exception—as to Dr. Schenck's evidence cannot be sustained. Nor can the fifth exception, as to the evidence of William Harper, as to her age, nor as to the Bible entries, as he swore that he knew the handwriting of Nellie's mother—that they were in her handwriting and the mother had been dead seven years. This exception is overruled.

The sixth exception cannot be sustained. This has been so often decided by this Court that it would seem to need no citations to sustain the action of the Court. *State* v. *Rowe,* 98 N. C., 629; *Grubbs* v. *Insurance Co.*, 108 N. C., 472.

The seventh exception cannot be sustained, for the reason that it was a correct enunciation of the law, and for the further reason that the defendants have not been convicted of rape, to which this charge of the Judge was applicable.

The eighth exception is that the Judge told the jury that the punishment for rape was death, and that for the lesser offence charged in the indictment it was fine or imprisonment in the penitentiary. We have at this term approved the ruling of Judge Starbuck in refusing, at the request of the jury, to give this instruction, and we do not wish to be understood as approving it in this case. But what grounds the defendants have to object to it, we are unable to see. In all probability it saved them from the gallows. The judgment is affirmed.

Affirmed.

STATE v. WILLIAM APPLE.

Indictment for Assault and Battery—Trial—Evidence—Witnesses—Instructions—Cruel and Unusual Punishment.

1. Error in the admission of incompetent testimony is cured by its subsequent withdrawal and a direction to the jury that they must neither consider it nor give it any weight in making up their verdict.
2. A party who elicits an unfavorable answer to a question on cross-examination cannot object to such answer.
3. An instruction to the jury on the trial of an indictment that they should scrutinize closely the testimony of the father and mother of defendant on account of the relationship but that, if their testimony was believed, it should have as much weight as that of other witnesses, was proper.
4. A sentence to two years imprisonment and working on the roads is not "cruel and unusual" punishment for an unjustifiable and outrageous assault combined with robbery.

INDICTMENT for assault, tried before *Adams, J.*, and a jury at August Term, 1897, of GUILFORD Superior Court. The defendant was convicted and sentenced to jail for two years to be worked on the public roads of the County and from this judgment the defendant appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
No counsel *contra*.

FURCHES, J.: Indictment for assault and battery. The evidence tended to show that the defendant and two others assaulted the prosecuting witness while on his way home from Greensboro; that the prosecuting witness was 77 years old and was traveling in his wagon, when he was attacked by the defendant and the other two men; that they came out of the bushes on the side of the road and demanded his whiskey; that they beat him until he was unconscious, and when he came to consciousness again, a pint of whiskey and $2.50 he had when they attacked him were gone; that he was laid up for a month from the injuries he received from the defendant and those with him in making this assault. James Green, a witness for the State, was asked if he had ever heard defendant make threats against the prosecuting witness Holt. This evidence was objected to but allowed, and defendant excepted, and the witness said he had. But it was afterwards withdrawn, and the Court charged the jury that they must not consider it in making up their verdict. If this was error, it seems to us that it was cured by being withdrawn, and by the charge of the Court.

The State introduced one Reese as a witness, who testified that he knew the general character of Mrs. Bugsby, a witness introduced by the defendant, and that it was bad. The defendant on cross-examination asked him what it was bad for, and he answered that "she kept a bawdy house." Defendant objected and excepted to this.

We fail to see the force of this exception. It was his own evidence. If the defendant goes fishing in the State's waters he must take such fish as he catches.

The father and mother of the defendant were introduced as witnesses for him, and the Court charged the jury that it was their duty to scrutinize this testimony, as the witnesses were nearly related to the defendant, but they could not reject it on that account, and that, after thus scrutinizing their testimony, if they believed they had sworn the truth, they should give it the same weight as if they were not related to the defendant. This ruling has been sustained so often by this Court that we hardly feel called upon to cite authority. *State* v. *Boon*, 82 N. C., 637; *State* v. *Holloway*, 117 N. C., 730; *State* v. *Collins*, 118 N. C., 1203.

The defendant objects and excepts to the judgment of the Court, as being cruel and unusual and, therefore, unconstitutional. Constitution, Article I, Section 14. But it does not seem to us that two years imprisonment, to be worked on the roads, for such an assault as this, (accompanied with robbery,) is cruel or unconstitutional. *State* v. *Pettie*, 80 N. C., 367; *State* v. *Miller*, 94 N. C., 904. It may be, as it appears to us from the evidence, that the defendant was guilty of a higher offence than that of assault and battery.

Affirmed.

STATE v. E. L. WEBSTER, R. B. WEBSTER and DON BUCHANAN.

Indictment for Forcible Trespass—Practice—"Broadside" Exception—Trial—Title.

1. A "broadside," or general, exception to the refusal of the trial Judge "to give the instructions as asked, and for instructions given," will not be considered in this Court.
2. As forcible trespass is essentially an offence against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offence.
3. While to constitute forcible trespass the possessor must be present and forbidding or objecting, it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is *completed* which, if continued, becomes forcible after being forbidden even if not so in its incipiency.
4. Where, on the trial of an indictment for forcible trespass, it appeared that defendants went upon the prosecutor's premises and demanded certain machinery in his possession, which was refused, and that next morning they began to take down the machinery in the prosecutor's absence but about an hour afterwards he came and ordered them to stop, whereupon one of them assaulted him and they continued the work until stopped by an officer; *Held*, that the trial Judge properly left to the determination of the jury the question as to who was in possession and instructed them that if defendants were in possession they should be acquitted, otherwise they were guilty.

INDICTMENT for forcible trespass, tried before *Allen, J.*, and a jury at Spring Term, 1897, of CHATHAM Superior Court.

The facts appear in the opinion. The defendants were convicted and appealed.

Mr. Zeb V. Walser, Attorney General, and *Messrs. Womack & Hayes* for the State.

Messrs. Murchison & Calvert, for defendants (appellants).

DOUGLAS, J.: This is a criminal action charging the three defendants with forcible entry and trespass. There was a verdict of guilty as to two of the defendants, third defendant not having been taken. The convicted defendants appealed, assigning as error the exclusion of certain testimony tending to show title in the defendants, and for the refusal of the Court "to give the instructions he asked, and for instructions given." We think that the defendants' prayers for instruction which were not given by the Court, were properly refused; and we cannot consider the "broadside exception" to the charge as given. This principle is too well settled to need the citation of the long line oj authorities, and it is sufficient to say that it was re-affirmed in three different cases at the last term of this Court: In *Hampton* v. *Railroad*, 120 N. C., 534; *Burnett* v. *Railway Co.*, Ibid, 517; *State* v. *Moore*, Ibid, 570. This rule becomes the more imperative as we ourselves fail to see any substantial error in the charge. The entire evidence, taken as a whole, discloses every element of the offence for which the defendants were convicted. The testimony offered by them as to the contract of April, 1896, if admitted, would have been of no avail, as forcible trespass is essentially an offence against the *possession* of another, and does not depend upon the title. *State* v. *Bennett*, 20 N. C., 43; *State* v. *McCauless*, 31 N. C., 375; *State* v. *Davis*, 109 N. C., 809. The defendant, E. L. Webster himself, testified that he and the prosecutor, Thomas, had some kind of a contract in April, 1896, for the purchase of the property; that there was a dispute about the terms; that they (defendants) went to see Thomas on December 28, the day before the offence was committed, and offered to him the mortgage and balance due according to their interpretation of the contract, which was refused; that Thomas refused to settle or do anything until he could see his lawyer; that next morning they went over and began taking down the machinery, and were there about an hour when Thomas came and objected; and that after being *forbidden* they kept on until stopped by an officer. Thomas had testified that he had ordered the defendants to stop tearing down his property and that the defendant, R. B. Webster, ran at him with an iron wrench about twelve or fourteen inches long, and struck him; and this testimony was not contradicted by the defendants.

Thomas appears to have been in possession of the property, even if he were not at all times personally present at the exact spot. *State* v. *Bryant*, 103 N. C., 436.

His refusal to give up the property on the preceding day was equivalent to forbidding the defendant to take it. *State* v. *McAdden*, 71 N. C., 207. Admitting the peaceable entry of the defendants, their violent and unlawful conduct after being ordered to leave by the prosecutor makes them guilty of the offence. *State* v. *Wilson*, 94 N. C., 839; *State* v. *Talbot*, 97 N. C., 494; *State* v. *Lawson*, 98 N. C., 759; *State* v. *Gray*, 109 N. C., 790.

While to constitute forcible trespass the possessor must be present and forbidding and objecting, it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is completed, which, if continued, becomes forcible after being forbidden, even if not so in its incipiency. The defendants were three in number; they took the property with a "strong hand," and one of them actually assaulted the prosecutor with what may have been a deadly weapon. *State* v. *Lawson, supra; State* v. *Davis,* *supra; State* v. *Gray, supra; State* v. *Woodward*, 119 N. C., 836. Their conduct not only strongly tended to a breach of the peace, but actually produced it. The Court left the question as to who was in possession to the jury, and instructed them that if the defendants were in possession, they should be acquitted. As no error appears to us, the judgment is affirmed.

Affirmed.

STATE v. C. E. McLEAN et al.

Indictment for Unlawful Opening Graves—Intent—Trial—Instructions—Mayor and Commissioners—Official Acts—Jurisdiction—Mistake—Defence.

1. When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence.
2. Under Section 1 of Chapter 90, Acts of 1885, providing that any person who shall without due process of law or the consent of the next of kin of the deceased, open any grave for the purpose of removing anything interred therein, shall be guilty of a felony, the doing the forbidden act itself is conclusive as to the intent with which it was done.
3. On the trial of several defendants charged with an offence, upon an intimation from the Court as to the law and an indication from the counsel for the defendants that they would not argue the case to the jury except as to the guilt of two of them, the State's solicitor stated that he would consent to a verdict of not guilty as to such two defendants. The defendants' counsel, after consultation, then stated that they would argue the case as to the others whereupon the solicitor withdrew his proposition as to the verdict concerning the two defendants. *Held*, that it was proper for the trial Judge to refuse to direct the State's solicitor to enter a verdict of not guilty as to the two defendants.
4. At a meeting of the Board of Commissioners of a town, at which the Mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town

cemetery and had not paid for them, should pay the amount due within sixty days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. Subsequently, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the Mayor said: "The way is open: go ahead and remove them;" *Held*, that the Mayor was individually guilty of counseling, procuring and commanding an act within the meaning of Section 977 of *The Code*, the committing of which afterwards was a felony.

5. In such case, the act of the Mayor and Commissioners was outside of their official jurisdiction and hence they were individually liable to indictment for commanding and procuring persons to commit a felony.
6. In such case the Mayor and Commissioners, acting outside of their jurisdiction, were bound to know the requirements of the Statute and could not be heard to say that they acted in good faith and were honestly mistaken in the scope of their official power.

INDICTMENT against C. E. McLean, J. H. Heritage, J. C. Holt and others, under Section 977 of *The Code*, for counseling, procuring and commanding the removal of a body buried in a cemetery without due process of law and without the consent of the next of kin of the deceased, tried at Spring Term, 1897, of ALAMANCE Superior Court. The facts are stated in the opinion. The defendants' prayers for instructions were as follows:

"First. There is no evidence against Joseph C. Holt and J. H. Heritage and the jury will return a verdict of not guilty as to them.

Second. If the jury believe from the evidence that C. E. McLean was Mayor of the town, that he did not vote for the order of removal, he would not be guilty, and they must so find; and the fact that he was acting as Attorney of the town and in his capacity as Attorney, advised the Board of Commissioners that in his opinion they had the right to order the removal, would not make him guilty.

Third. It appearing from the evidence that the defendants were Commissioners of the town of Burlington; and that in ordering the removal of the bodies they acted in their official capacity, and there being no evidence of any corruption in this action, they cannot be convicted.

Fourth. The defendants being proven by the evidence in this case to be the Mayor and Commissioners of the town of Burlington, and the acts for which they are indicted having been proven to have been done by them in their official capacity, they cannot be indicted individually and the jury should acquit.

Fifth. Upon the whole evidence in this case, the Court instructs you that the Statute under which this indictment is found does not apply to this case, and the jury should acquit.

Sixth. That if the jury believe defendants were acting in their official capacity when they advised and directed the removal of the remains from the grave and their reinterment in another part of the cemetery, and that they acted in good faith and were honestly mistaken in the scope and extent of their power in regard to the matter, and their mistake was in reason and such as reasonable men of ordinary intelligence might make, after consideration, then the defendants would not be guilty of the felony charged in the bill.

Seventh. That notwithstanding the defendants may have violated the letter of the law, yet if their acts do not come within its spirit and the mischief intended to be suppressed by it, then the defendants would not be guilty and that the mischief intended to be suppressed by the Statute is the desecration and robbery of the graves of the dead."

The defendants, except Holt and Heritage, were convicted and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. E. S. Parker, J. T. Morehead, W. H. Carroll, John G. Bynum and *T. B. Womack,* for defendants (appellants).

MONTGOMERY, J.: The disturbing of graves, by Chapter 90 of the Acts, 1885, is made a felony, in the following words: "Section 1. That any person who shall without due process of law, or the consent of the surviving husband or wife, or the next of kin of the deceased, and of the person having the control of such grave, open any grave for the purpose of taking therefrom any such dead body, or any part thereof buried therein, or anything interred therewith, shall be deemed guilty of a felony, and upon conviction thereof shall be fined or imprisoned or both, at the discretion of the Court."

The defendants were indicted under Section 977 of *The Code* for counseling, procuring and commanding certain named persons, all of them charged with acting without due process of law and without the consent of those persons whom the Statute requires should be consulted and their consent procured, to open the grave of Nathaniel Small for the purpose of taking therefrom his dead body and to actually remove the body from the grave. The defendants, Holt and Heritage were acquitted. At the time the offence was committed the defendant McLean was Mayor of the town of Burlington, the defendant Cates was keeper of the town cemetery, and the other defendants, Staley, Sellars, Hall, Pickett, Sutphin and Hughes were town Commissioners. The defence set up by McLean was that he was the attorney at law of the town and that the part he took in the matter was simply as legal adviser to the Board of Commissioners. He admitted on the trial that he advised the other defendants that they could lawfully remove the body. The other defendants, except Holt and Heritage, undertook to defend their action on the ground that, although they commanded, counseled and procured the opening of the grave and the removal of the body, their action was in the discharge of their official duties and under due process of law and in good faith. The following facts were made clear on the trial and were undisputed. Small died in 1887 and was buried in the Lutheran cemetery in the town of Burlington. Several years afterwards the town authorities by consent of all persons interested, at the expense of the town, removed the bodies which had been buried in the Lutheran cemetery to Pine Hill, the town cemetery. The body of Small was among the number removed and it was reinterred in a lot in Pine Hill. On the fifth of January, 1897, a considerable time after the reinterment of Small's body, the town authorities, who were the defendants in this prosecution, in regular meeting, adopted a report made by the committee on the business of the cemetery which was in part in the following words: "Section 1. We find that eighteen lots have been taken and used by parties who have paid nothing for the same and that said parties have no note or memorandum in writing in regard to the transaction, signed by the party to be charged, and as to these lots the committee recommend that the Secretary of the Board of Commissioners notify the parties who claim the same, that, unless they come forward and pay for said lots in full within sixty days from the date of said notice, the bodies buried on said lots will be removed to that part of the cemetery which is free."

That J. W. Small, the next of kin of Nathaniel Small, received on February 1st, 1897, a note addressed to him by the town authorities in the following words: "Burlington, N. C., Feb. 1st, 1897. Mr. J. W. Small, Dear Sir:—At a recent meeting of the Board of Commissioners held at the Mayor's office, the following resolution was adopted: "*Resolved*, That all parties who have buried on the lots of the City Cemetery of Burlington, N. C., and who have not paid for the same, take notice that unless they settle for the same in less than sixty days from the date of this notice, that the bodies will be removed to that part of the cemetery which is free. The books show your indebtedness is $13.40. Please settle promptly. Respectfully, J. C. Staley, Sec."

That J. W. Small declined to pay the amount and forbade the removal of the body; that the body was removed from the lot on which it was buried in Pine Hill cemetery to the free part of the cemetery.

The first assignment of error on the part of the defendants relates to the refusal of his Honor to admit testimony offered to show the *bona fides* of the defendants in the matter of their having ordered, procured and commanded the opening of the grave and the removal of the body. The question, then, is whether or not it is necessary to allege and prove a felonious intent or indeed any specific intent on the part of the defendants other than the intent to do which they actually did, and which was forbidden by the Statute in language plain and certain. There are many decisions of this Court to the effect that the only intent necessary to be shown in the doing of an act which is forbidden by law is the intent to do the act. If however a grave should be opened and a dead body removed therefrom by a person who had made an honest mistake as to identity of the grave and body, after having received the permission of the next of kin of the person whose grave he thought he was opening, in such case the intent would not exist to do the act. But in the case before us the defendants did exactly what they *intended* to do; they knew whose body they had commanded to be removed, they knew the assigned reason for which it was ordered to be removed and they knew that the removal was opposed by the next of kin. In *State* v. *Smith*, 93 N. C., 516, it is said by the Court: "It was not required of the State to prove more than that the forbidden act was intentionally done," and in the same opinion the Chief Justice quotes the language used by the Court in *State* v. *King*, 86 N. C., 603, "When an act forbidden by law is intentionally done *the intent to do the act* is the criminal intent which imparts to it the character of an offence; and no one who violates the law, which he is conclusively presumed to know, can be heard to say that he had no criminal intent in doing the forbidden act." In *State* v. *McBrayer*, 98 N. C., 619, it is held that "when the Statute plainly forbids an act to be done and it is done by some person, the law implies conclusively the guilty intent although the offender was honestly mistaken as to the meaning of the law he violates." "When the language is plain and positive and the offence is not made to depend upon the positive wilful intent and purpose, nothing is left to interpretation." "The criminal intent is inseparably involved in the intent to do the act which the law pronounces criminal." *State* v. *Voight*, 90 N. C., 741. To the like effect are the decisions in *State* v. *Kittelle*, 110 N. C., 560; *State* v. *Downs*, 116 N. C., 1064; *State* v. *Chisenhall*, 106 N. C., 676; *State* v. *Scoggins*, 107 N. C., 959.

The counsel of defendants admitted that it was not necessary in trial for misdemeanors to allege and prove any specific intent where the act was forbidden by Statute, but they insisted that the rule did not apply in cases of felony. We cannot upon reason or authority see the distinction attempted to be drawn. In felonies at common law (except those in which malice is presumed) the intent has to be proved for the reason that the doing of the act itself which constitutes the offence in so many words is not denounced. As, for instance, upon the trial of one indicted for larceny the felonious intent must be proved because the taking of the goods might be shown to have been done by way of trespass, or under a *bona fide* claim of right. The law does not make the taking of the goods larceny, the taking might be under a claim of right or in the way of trespass, but it makes the taking of the goods with a felonious intent the crime of larceny. In the case before us the law denounces as a felony the very act itself which the defendants committed.

We see no reason why the Legislature should not, equally in misdemeanors and in felonies, make the forbidden act itself conclusive as to the intent with which it is done. But we have an authority directly on the point. In *State* v. *Chisenhall*, 106 N. C., 676, where the defendant was indicted for abduction, the Court held that "it was necessary for the State to have shown the intent of the defendant. There is nothing in our Statute which requires that the abduction should be with a particular intent." It was argued here for the defendants that the last cited authority was not against their position because, under our Statute, abduction was not a felony. We think that the counsel were in error. Under our Statute a person convicted of abduction may be sentenced to the penitentiary for a period not exceeding fifteen years; and the Statute of 1891 defined a felony to be a crime which is or may be punishable by either death or imprisonment in a State prison. The case on appeal sets forth that "After the case was closed, and after a free discussion of the law upon defendants' prayer for instruction and intimation from the Court as to law, it was indicated that there would be no argument to the jury except as to Heritage and McLean, and thereupon the Solicitor said, to shorten the case, he would consent to a verdict of not guilty as to McLean and Heritage, and so stated to the Court. In a few moments a consultation was held by the counsel for the defendants and they announced that they would argue the case to the jury as to the others, and thereupon the Solicitor said that he would let the jury pass upon the question as to the guilt of all of them and withdrew his proposition, refused to consent to anything about it. His Honor ruled that it was for the jury to say what verdict they would render and declined to compel the Solicitor to enter a verdict of not guilty as to the two defendants, Heritage and McLean, and defendants excepted."

The second and third assignments of error are directed to the refusal of his Honor to sustain the exception of the defendants concerning the agreement between the Solicitor and the defendants' counsel at the trial. Nothing need be said about that ruling of his Honor except that it was so clearly right that we do not see on what ground any just exception could be taken. The fourth assignment of error refers to the refusal of the Court to give the seven special instructions prayed for by the defendants.

I. The refusal to give the first prayer can be dismissed with the statement that the defendants, Holt and Heritage, for whose benefit the prayer was made, were both acquitted; the first named because he was not present at any of the meetings at which the opening of the grave and the removal of the body were discussed, and the last named because he opposed the course pursued by the other defendants.

II. The Court was asked to instruct the jury "that, if they believed from the evidence that McLean was Mayor of the town; that he did not vote for the order of removal, he would not be guilty and they must so find; and the fact that he was acting as attorney of the town and in his capacity as attorney advised the Board of Commissioners that, in his opinion, they had the right to order the removal, would not make him guilty." His Honor would have been justified in refusing to give this instruction upon the ground that, in its last clause, it assumed as a fact that which had to be passed on by the jury; that is, that McLean was acting as attorney of the town and in his capacity as attorney advised the Board. His Honor, however, gave the instruction, adding thereto the words "unless as Mayor he commanded or procured the opening of the grave and the removal of the remains of which you must be satisfied beyond a reasonable doubt before you can convict him." The defendant excepted to the addition made by his Honor. The exception is not sustained. McLean's guilt did not depend upon his voting upon the command and order of removal. He could have counseled, commanded and procured the removal without a vote. One of the witnesses, Staley, testified that at the last meeting of the defendants in March or April when final action was taken, no vote was had; that it was simply remarked that the notice given at a former meeting was sufficient, and that Cates was instructed to carry out that notice to remove the bodies. In fact, the defendant McLean himself said that no vote was taken at that meeting, that some one remarked that no vote was necessary, that the previous action was sufficient. He also testified that his legal opinion was asked and he gave it, and no member objected. The defence of McLean seems to be very much strained, but it finds no sympathy in this Court. His Honor did him more than justice in the trial. He himself testified that at the meeting in January, 1897, the report of the Cemetery Committee in which it was recommended that, unless parties who had taken lots and who had not paid for them came forward and did so within 60 days from the time of notification, the bodies buried on the lots would be removed to that part of the cemetery which is free, was adopted and spread on the minutes. That action could not have been done without his being a party to it. He must have put the vote and declared the result. This was directly participating in the crime of which the defendants have been indicted and convicted. The act which was ordered to be done was the beginning of the crime which was committed. That action was not within their jurisdiction, and the act contemplated and ordered, amounted to a felony under our law. It is true that McLean testified that he was the attorney of the town and that he only acted as such attorney and not as Mayor; that (to use his own language) "he advised the Board, as its attorney, that they had the right to remove the bodies; he thought so then and thinks so now." But there was another witness in the case, William Nance, who testified that McLean, in reply to a question of Heritage as to the legal right to remove the bodies, said "the way is open, go ahead and remove them." His duty as an attorney ended when he gave his legal opinion (if, indeed, he could act in the dual capacity of Mayor and legal adviser to himself and the Board) that they had the right under the law to remove the bodies; when he went further and said "go ahead and remove them" he became an individual actor and counseled, procured and commanded an act the committing of which afterwards was a felony.

III. His Honor was right in refusing to give the third prayer for instructions for the reasons given by us in discussing the second prayer.

IV. The fourth prayer for instructions is in the following words: "The defendants being proved by the evidence in this case to be the Mayor and Commissioners of the town of Burlington and the acts for which they are indicted having been proved to have been done by them in their official capacity, they cannot be indicted individually and the jury should acquit." The defendants were not indicted as Mayor and Commissioners for any misconduct in office; they were indicted as individuals for counseling, procuring and commanding persons to commit a felony, *i. e.*, to open the grave of Nathaniel Small and to actually remove the body without due process of law and without the permission of such person as the law required them to have. The charge was that they were not acting within the line of their duty as Mayor and Aldermen; that the matter was not only not within their jurisdiction but that, in their action, they were commanding and procuring persons to commit a felony. The defendants cannot be said to have acted in their official capacity in respect to a matter which was not only not a part of their duty to the public but in its performance was a positive crime against the State. His Honor properly refused to give the instruction.

V. There was no error in the refusal of the Court to give the 5th prayer of instruction for the reasons already given.

VI. The 6th instruction was as follows: "If the jury believe the defendants were acting in their official capacity when they advised and directed the removal of the remains from the grave and their reinterment to another part of the cemetery, and they acted in good faith and were honestly mistaken in the scope and extent of their power, and their mistake was in reason and such as reasonable men of ordinary intelligence might make, after consideration, then they would not be guilty of the felony charged." This request is a singular one when it is seen that the defence relied on was that they were proceeding under the due process of the law. Can a man be allowed to plead ignorance of a law under which he is professing to act? "Ignorance of the law excuses no one." This may be sometimes a hard rule but without it society, as we have it organized, would go to pieces. "It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced in every trial by conflicting evidence upon the question of ignorance." *State* v. *Boyett*, 32 N. C., 336. If the defendant Commissioners meant that the advice of counsel partly made their mistake reasonable, and such as reasonable men might make after consideration, that cannot avail them. In *State* v. *Downs*, 116 N. C., 1064, Justice Clark for the Court said: "Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value. *State* v. *Boyett*, 32 N. C., 336. The law does not encourage ignorance in either. *State* v. *Dickens*, 20 N. C., 406. If ignorance of counsel would excuse violation of the criminal law, the more ignorant counsel could manage to be, the more valuable and sought for, in many cases, would be his advice." It is not to be understood, however, that, if the Mayor and Board of Commissioners of a town or city acting within the line of their duty and in reference to matters clearly within their power, should make an honest mistake without negligence as to the law governing their action, they would be liable therefor either criminally or civilly. Within their jurisdiction they would be a part of the law-making power and not responsible for mistakes unattended with negligence or bad faith. But in the case before us the defendants, as we have said, were acting outside of their jurisdiction, and commanded an act to be done which the law had pronounced a crime. The defendants had the right to purchase land for a cemetery and they could make proper rules for its management, but that power could not be extended to give the town authorities the right to open the graves and remove the dead therefrom, from one point to another, without due process of law or without the consent of those persons whose permission is necessary.

VII. The 7th prayer for instruction is in the following words: "That, notwithstanding the defendants may have violated the letter of the law, yet if their acts do not come within its spirit and the mischief intended to be suppressed by it, then they would not be guilty, and that the mischief intended to be suppressed by the Statute is the desecration and robbery of the graves of the dead." The

Statute is absolutely clear in the language employed and is directed against all who disturb the last resting place of the dead, except those who act under the due process of law or who procure the permission to open the graves and remove the body from the surviving husband or wife, or the next of kin of the deceased, and of the person having control of such grave. Why should it be thought that the law should apply to those only who open a grave or procure it to be done, and have removed dead bodies for purposes of medical or surgical knowledge or for purposes of larceny of anything buried with the body? If a surgeon can be convicted for employing a person to open a grave and remove therefrom a dead body, his purpose being to advance medical and surgical science, what reason can be urged against the conviction of persons who command a grave to be opened and the body to be removed because the lot of land on which the deceased has been buried is not paid for by his next of kin? The sixth exception of the defendants is to that part of the charge which is in these words: "In that the Court instructed the jury that there was no due process of law." This exception is disposed of by what we have already said. The defendants had no authority themselves to do the act; they had no legislative authority; they had no authority from the Courts by judicial determination. They acted in the face of a Statutory law, most humane and most salutary, and their conduct was what the law termed a felony. The last exception is untenable for the reason that his Honor did not charge the jury in the language complained of nor in language its equivalent. No error.

Affirmed.

STATE v. CHARLES BRAMBLE.

Practice—Appeal in Forma Pauperis—Affidavit.

The omission, in an affidavit to appeal *in forma pauperis*, of the averment that it is made in good faith, is a fatal defect and for such defect the appeal will be dismissed as a matter of right and not of discretion.

The defendant was convicted on a criminal charge at September Term of CUMBERLAND Circuit Criminal Court, before *Sutton, J.*, and a jury and appealed *in forma pauperis*. In this Court the Attorney General moved to dismiss appeal for defective affidavit.

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. H. L. Cook and *H. McD. Robinson,* for defendant (appellant).

Per Curiam: The affidavit to appeal *in forma pauperis* is fatally defective, as it omits the averment that it is "made in good faith," which is required by *The Code*, Section 1235. The appeal must be dismissed as a matter of right, not of discretion. *State* v. *Harris,* 114 N. C., 830; *State* v. *Rhodes,* 112 N. C., 856; *State* v. *Jackson,* Ibid, 849; *State* v. *Shoulders,* 111 N. C., 637; *State* v. *Wylde,* 110 N. C., 500; *State* v. *Tow,* 103 N. C., 350; *State* v. *Moore,* 93 N. C., 500; *State* v. *Payne,* Ibid, 612; *State* v. *Jones,* Ibid, 617; *State* v. *Morgan,* 77 N. C., 510; *State* v. *Divine,* 69 N. C., 390.

Appeal dismissed.

STATE v. J. M. MATTHEWS.

Indictment for Obtaining Money under False Pretenses—Evidence, Sufficiency of

1. If a person by his acts or conduct induces another to believe that a fact is really in existence, when it is not, and thereby obtains money or property, he comes within the scope of the Statutes against false pretenses.
2. Where, on the trial of an indictment for obtaining money under false pretenses, there was evidence that the defendant obtained money from the deceased husband of the witness to get an Electropoise which defendant, claiming to be an agent therefor, had agreed to sell to the husband, and which defendant claimed to be in the Express office, when there was, in fact, no Electropoise in such office, and that the defendant kept the money so obtained; *Held*, that the evidence was sufficient to be submitted to the jury.

Indictment for obtaining money under false pretenses, tried before *Coble, J.*, and a jury at March Term, 1897, of Moore Superior Court. The defendant was convicted and appealed. The facts appear in the opinion.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. *W. E. Murchison*, for defendant (appellant).

Clark, J.: This was an indictment for obtaining goods under false pretenses, *Code*, Section 1025, and the only exception is that the Judge refused to charge as prayed "that the evidence was not sufficient to sustain the charge." In the evidence sent up it appears, *inter alia*, that the principal witness for the State testified that "the defendant claimed to be an agent for the Electropoise; my husband promised and agreed to take one; the defendant came to my house on Monday evening and wanted to borrow horse and buggy to go to Jonesboro for it on Tuesday morning and said he would have to have $25 to get it out of the Express office.

. . . When he came back he said it had not come yet. . . . Defendant said he wanted $25 to get the Electropoise out of the express office, that it was at Jonesboro; never got the Electropoise and never got any of the money back." On cross examination she said "the defendant came and said he must have $25 to get it out of the express office at Jonesboro. He talked like it was in the express office. . . . At the time he (her husband) paid defendant $25, defendant said 'I must have $25 now, before I get it out of the express office.'" The evidence was properly left to the jury in a very careful charge by the Court, who explained to them that the State must satisfy them beyond a reasonable doubt (1) That the defendant represented to J. A. Moore, as charged in the indictment that there was an Electropoise in the express office at Jonesboro, (2) That the $25, if obtained, was obtained on that representation, (3) That the representation was false and (4) was made with intent to defraud, and (5) thereby said Moore was defrauded, *State* v. *Phifer*, 65 N. C., 321, but that, if either of said ingredients was not proved, they should find the defendant not guilty. The Court further instructed the jury that the false representations must have been of the subsisting fact and that, if the defendant represented that the Electropoise *would be* at Jonesboro, he could not be convicted. *State* v. *Mangum*, 116 N. C., 998; *State* v. *Daniel*, 114 N. C., 823. "If the false pretense consists in words which are indefinite and uncertain, the jury is to determine whether they were intended to and did convey a false impression, the circumstances surrounding the transaction being taken into account in determining that question." I McClain Crim. Law, p. 676; *State* v. *Alphin*, 84 N. C., 745; *State* v. *Call*, 48 N. H., 126. "If a person by his acts or conduct induces another person to believe that a fact is really in existence when it is not, and thereby obtains money or property he comes within the scope of the Statutes against false pretences." 7 Am. & Eng. Enc., 751.

No error.

STATE v. M. M. FURR.

Indictment for Compounding Felony—Practice—Trial—Exceptions to Evidence Before Verdict—Motion in Arrest of Judgment—Instructions.

1. On the trial of a Justice of the Peace charged with compounding a felony, the Court was requested to instruct the jury, in substance, that the defendant, being a Justice of the Peace, is not guilty of compounding a felony for merely making an honest mistake in judgment in regard to his duty to dismiss the parties before him charged with the felony, and if he, through ignorance of law, failed to conduct the case in a regular and orderly manner "he is not guilty." His Honor gave the instructions modified by the substitution of the words "This alone would not make him guilty" for the closing words of the prayer; *Held*, there was no error.
2. Exceptions to the sufficiency of evidence to support a verdict must be taken before verdict.
3. A judgment can be arrested in criminal cases only when the defect complained of appears upon the record proper.
4. Where parties charged with larceny were arrested and taken before a Justice of the Peace and were discharged after the payment of the costs and a sum of money agreed upon between them and the prosecutor, such voluntary payment was evidence of their guilt of the larceny charged in the warrant, and the acceptance of the costs from the defendants by the magistrate was some evidence against him on the trial of an indictment for compounding the felony.

INDICTMENT against M. M. Furr, a Justice of the Peace, and others, for compounding a felony, tried before *Coble, J.*, and a jury at Fall Term, 1897, of CABARRUS Superior Court. The defendants, Furr and Widenhouse, were convicted. The judgment of the Court was that the defendant Furr be removed from the office of Justice of the Peace and be disqualified from holding or enjoying any office of honor, trust or profit in the State and pay a fine of $50, from which judgment defendant Furr appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. Morrison Caldwell, for defendant (appellant).

MONTGOMERY, J.: The defendants, M. M. Furr, a Justice of the Peace, D. M. Widenhouse, Jason Furr, Hiram Cox and Luther Bost, were indicted for compounding a felony, charged in the indictment to have been committed by the last three of the above named. The defendants Widenhouse and M. M. Furr, the Justice of the Peace, alone were put upon trial. There seems to be a conflict between the printed record and the transcript as to whether Widenhouse was tried and convicted but that is immaterial as the defendant M. M. Furr is the only appellant here.

The special instructions asked by the defendant were given just as requested except that the fourth was modified. In that fourth prayer the defendant asked his Honor to give an instruction in the following words: "4th. The defendant M. M. Furr, being a Justice of the Peace, is not guilty of compounding a felony for merely making an honest mistake in judgment in regard to his duty to dismiss the defendants charged before him with the felony. If he, through ignorance of law failed to conduct the case against the defendants charged with the stealing of the goods of Mrs. Widenhouse in a regular and orderly manner, he is not guilty. The jury must be fully satisfied that said Furr acted in such case corruptly and for a reward or advantage."

His Honor gave every word of it except that he left out the words "he is not guilty," and substituted therefor "this alone would not make him guilty."

On the motion for a new trial, the grounds for the same were based first, on an alleged insufficiency of the evidence as to the receipt by Furr of any benefit or advantage derived from the alleged compounding, or that he had made any agreement not to prosecute the defendants Jason Furr, Cox and Bost.

The matter alleged as a first ground for a new trial was too late. Exceptions to the sufficiency of evidence must be taken before verdict. *State* v. *Harris*, 120 N. C., 577. In respect to the matters constituting the second alleged ground for the motion we find that the charge was sufficiently clear and full; that part of the charge was as follows: "It is for the jury to decide from the evidence if the State has satisfied you beyond a reasonable doubt that the defendant Widenhouse had had certain property stolen and that certain parties, Jason Furr, Hiram Cox and Luther Bost were charged with the crime, and that said parties, Jason Furr, Hiram Cox and Luther Bost paid defendant Widenhouse a certain amount of money and that, in consideration of the money paid him, he agreed to put an end to the prosecution against said parties, or agreed in consideration of the money paid him not to prosecute them for the crime charged; and if the jury are further satisfied beyond a reasonable doubt that defendant Furr received a part of the money paid by the said Jason Furr, Cox and Bost, and in consideration of the money so paid him he put an end to the prosecution against said Jason Furr, Cox and Bost, or in consideration of the money so paid him he agreed not to prosecute them for the crime charged, then the jury will find both defendants Furr and Widenhouse guilty. If Jason Furr, Cox and Bost paid a certain sum of money to Widenhouse in payment of the goods taken and the money was paid only for the goods and Widenhouse never agreed with them not to prosecute them and did not agree to put an end to the prosecution already against them, then Widenhouse would not be guilty. If defendant Furr did not put an end to the prosecution against

Jason Furr, Cox and Bost in consideration of any money paid him and did not agree, in consideration of any money paid him, that he would not prosecute them for the crime charged, but honestly mistaking his duty in the matter made inquiries of the prosecuting witness and was honestly of the opinion that there was not sufficient evidence in the case to bind said Jason Furr, Cox and Bost to Court, and dismissed the case and taxed the prosecuting witness with the cost, he would not be guilty.

A motion in arrest of judgment was made on the following ground: "Because the indictment charges that Hiram Cox, Luther Bost and Jason Furr committed the felony which the defendants, M. M. Furr, Jason Furr, D. M. Widenhouse and others are now indicted for compounding but the State has failed to show that Hiram Cox, Luther Bost, or Jason Furr had committed the felony alleged to have been by them compounded with defendants, M. M. Furr and D. M. Widenhouse."

The motion was improper. Judgments can only be arrested in criminal cases where the defect appears upon the record proper. *State* v. *Potter*, 61 N. C., 338. There was, however, evidence tending to show that the defendant received a part of the money paid by the defendants, Jason Furr, Cox and Bost. D. M. Widenhouse testified that Jason Furr, Cox and Bost each paid $5.16⅔, each payment being one third of the value of the stolen goods and one third of the costs due to the magistrate, and there was evidence that the defendant got a part of that money. There was evidence of the larceny in the conduct of the defendants, Jason Furr, Cox and Bost. When charged with the larceny of the goods they voluntarily agreed to have them valued, the costs added, and paid the same, insisting that they should be discharged and the prosecution stopped. It is true that the defendants, Jason Furr, Cox and Bost were under arrest under the warrant of the defendant, M. M. Furr, for the larceny of the goods but the evidence was received by the Court without objection by the defendant, M. M. Furr. It is true the defendant stated that at nine o'clock in the morning he informally examined the witnesses and found there was not enough testimony against them to bind them over to Court, but they were not discharged until three hours later, nor until the costs had been paid and the stolen goods paid for. . In this interval, there was evidence going to show that Jason Furr, Cox and Bost together with the owner of the goods, were some hundred yards off talking over the compromise and adjustment and that the defendant knew what was going on. We find no error in the ruling of the Court in the matters complained of, nor in the judgment of the Court.

No error.

STATE v. R. H. JOYCE.

Order of Board of Commissioners—Failure to Work Roads Indictable.

1. The judgment of a Board of Commissioners ordering the laying out of a public road is final until reversed, is binding upon all citizens of a county and cannot be collaterally attacked.
2. Where a Board of Commissioners ordered the construction of a public road, laid it out, appointed an overseer and assigned him hands to construct the road; *Held*, that such order constituted in the eye of the law a public road and the hands assigned were bound as for duty on any other road and were liable to indictment under *The Code*, Section 2020, if they refused to comply with the order.

PROSECUTION for failure to work public roads, tried before *Starbuck, J.*, and a jury, upon an appeal from a judgment of a Justice of the Peace, at Fall Term, 1897, of STOKES

Superior Court. The defendant was convicted and appealed. The facts appear in the opinion.

Mr. Zeb V. Walser, Attorney General, and *Mr. John D. Humphreys,* for the State.

Mr. A. M. Stack, for defendant (appellant).

FAIRCLOTH, C. J.: The defendant stands indicted under *The Code,* Section 2020, for failing to work a public road. There was an application by certain citizens of Stokes County, including the defendant, made to the County Commissioners to have a public road laid out and established between specified *termini* in said County. After some irregularity in the proceedings and after due notice, the Board of County Commissioners ordered said road to be laid out between the specified points, appointed an overseer, assigned hands to the overseer, including the defendant, and ordered the overseer to have the road constructed and put in order. The Board had authority to make the order. Acts, 1889, Ch. 338 and Acts, 1887, Ch. 73. The overseer ordered the road hands who had been assigned to him, including the defendant, to attend on a specified day to construct and work on said road. The defendant refused to attend and work on the ground that, although he was liable to road duty, he could not be required to aid in constructing and building a public road, and for this refusal he was indicted and convicted.

There was no appeal from the order of the Board of Commissioners above referred to. The Board having jurisdiction of the matter, their judgment was final until reversed, and was binding on the defendant and all citizens of the County and could not be collaterally attacked. *State* v. *Smith,* 100 N. C., 550.

When the Board of Commissioners ordered the road to be laid out and constructed as a public County road, appointed an overseer and assigned hands to him to construct the road, and ordered him to have the work done, in the eye of the law it became at once a public road, and the hands so assigned were as much bound to attend and work as any other road hands in the County, and they could not question the regularity of the proceedings of the Board in the matter, and if they refused to work they are liable under the general law to indictment. *The Code*, Section 2020; *State* v. *Witherspoon*, 75 N. C., 222. This would be so at common law, if there was no statutory mode of proceeding. *State* v. *Parker*, 91 N. C., 650.

This conclusion obviates the necessity of considering the defendant's other exceptions.

Affirmed.

STATE v. VIRGIL M. RAINEY.

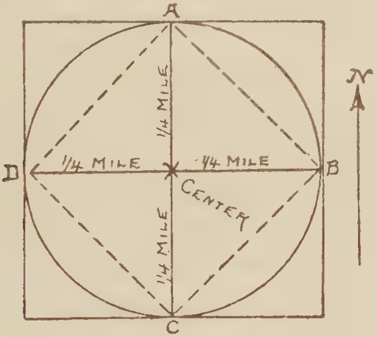
Indictment for Resisting Officer—Municipal Corporation—Charter—Boundaries.

Where the charter of a town provided that its corporate limits should be "one fourth of a mile East, West, North and South from the centre of the town which centre is the site of the brick building formerly known as the Court House, and shall run with the four cardinal points of the compass;" *Held*, that the boundary is a square whose sides run due East and West, North and South through five fixed points one fourth of a mile East, West, North and South from the designated centre.

Mr. Zeb V. Walser, Attorney General, and *Mr. A. M. Stack,* for the State.

Messrs. Jones & Patterson, for defendant (appellant).

Clark, J.: The question of the defendant's guilt or innocence depends upon the following clause in the Act incorporating the town of Germanton (Pr. Acts, 1883, Chapter 12, Section 2): "The corporate limits shall be as follows: One fourth of a mile East, West, North and South from the centre of the town, which centre is the site of the brick building formerly known as the Court House, and shall run with the four cardinal points of the compass." It was agreed that, if the above boundary was a circle, the defendant lived without the town limits and had no property in said limits, and was guilty of no offence in resisting the seizure of his property for town taxes by the town officer, but it was otherwise if the town limits were a square. If the charter had simply located the town limits "one quarter of a mile from the centre" the boundary would necessarily have been a circle (as in *Town of Luverne* v. *Shows*, 101 Ala., 359), but this charter requires two conditions, first, the corporate limits East, West, North and South of the centre shall be one quarter of a mile from the centre. This locates A, B, C and D on the subjoined diagram as points through which the boundary must run.



But there is a further condition: The corporate limits must not only run through these four points which are respectively one fourth of a mile East, West, North and South of the centre, but they must "run with the cardinal points of the compass," and that means they must run due

North and South, and due East and West. Running them, as thus called for, through the four points already fixed, we have the larger square on the above diagram. To describe a circle running through those four points (which both sides admit to be fixed) would not fill the second condition of running "with the cardinal points", since a circle at no time does this but is constantly changing its direction. It is true it would keep the boundary at all points one fourth of a mile from the centre, but that is not called for by the charter.

It was suggested on the argument that a square could be drawn running though the four fixed points A, B, C and D as the smaller square above shown. This square, we know geometrically, would be exactly half the area of the larger square, and being even smaller than the circle, if that is the boundary, it would acquit the defendant. Equally with the circle, it fills the first condition of passing through the four fixed points, one fourth of a mile East, West, North and South of the centre, but also, like the circle, it fails to fulfill the second condition of running "with the cardinal points of the compass," since its boundaries run N. E., S. E., S. W. and N. W. The only diagram that can be drawn, which will fill both conditions, is the larger square above, whose boundaries run through the four fixed points, and North and South, East and West.

No error.

STATE v. A. C. SNEED.

Indictment for Injury to Personal Property—Evidence—Debt —Tearing up Note—Statute, Construction of.

1. A promisory note or due bill being an "evidence of debt" and embraced in the term "personal property," (Section 3765 (6) of *The Code,* the

wanton and wilful injury to or destruction of it is indictable under Section 1082 of *The Code* as amended by Chapter 53, Acts of 1885.

2. Since the passage of Chapter 53, Acts of 1885, it is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and wilfully injures it nor is it material whether the property was destroyed or not.

INDICTMENT under Section 1082 of *The Code*, as amended by Chapter 53, Acts of 1885, tried before *Starbuck*, *J.*, and a jury at August Term, 1897. The facts appear in the opinion. The jury returned a verdict of guilty and the defendant moved in arrest of judgment because (1) the bill of indictment did not allege malice of the defendant nor did the evidence disclose any malice of the defendant towards the owner of the note and (2) because a promissory note or *chose in action* is not such personal property as is contemplated under Section 1082 of *The Code.* The motion was refused, as also one for a new trial, and defendant appealed.

Mr. Zeb V. Walser, Attorney General, and *Mr. A. M. Stack,* for the State.

Messrs. L. M. Swink and *Jones & Patterson*, for defendant (appellant).

DOUGLAS, J.: This is a criminal action under Section 1082 of *The Code*, as amended by Chapter 53 of the Laws of 1885, charging that the defendant "did wantonly and wilfully injure, mutilate, tear up and destroy certain personal property belonging to C. D., *to-wit:* a certain promissory note, due bill or written evidence of debt, &c." The only point really before us is whether the paper writing destroyed was such personal property as is contemplated by the above Section. We think this is fully settled by Section 3765 of *The Code*, which provides that: "In the construction of all Statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the same Statute, that is to say, (6) . . . The words 'personal property' shall include monies, goods, chattels, *choses in action* and evidences of debt, including all things capable of ownership, not descendible to the heirs at law." A promissory note or due bill is certainly an evidence of debt, and its loss or destruction may cause the loss of the debt. In any event, its loss would entail upon the owner additional trouble and perhaps expense, which would amount to an injury more or less serious. Such an injury it was the evident intent of the law to prevent or to punish. We see no repugnance or inconsistency in placing upon Section 1082 of *The Code*, the construction required by sub-section 6 of Section 3765; and, in fact, in no other way can it be made effective to carry out its true intent and purpose.

Since the passage of the Act of 1885, Chapter 53, it is no longer necessary to allege and prove malice to the owner. It is sufficient to show that the injury was done wantonly and wilfully, and it is immaterial whether the property was destroyed or not. With this explicit legislative construction, in strict conformity with the letter of the Statute and in entire accordance with its spirit, we have no occasion to cite decisions rendered before its passage simply to disturb its well settled meaning.

In the absence of any error appearing in the record, the judgment is affirmed.

Affirmed.

STATE v. ALEXANDER JONES.

Indictment for Failure to Pay Taxes—Machinery Act—Statute, Constitutionality of.

1. The failure to pay taxes before the day on which the collector's right to collect them by distress begins is not an indictable offence under Sections 52 and 53 of Chapter 168, Acts of 1897 (Machinery Act)

2. A Statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities to which they are applicable and contain no violation of the principle of equation of taxation.

INDICTMENT for failure to pay State and County taxes on the first Monday of September, 1897, and before the first Monday of November, 1897, tried before *Starbuck, J.*, and a jury at Fall Term, 1897, of ROCKINGHAM Superior Court. The jury rendered a special verdict as follows: "That the defendant Alex Jones was on or before the first day of June, 1897, between the ages of 21 and 50 years and was a resident of Wentworth Township, Rockingham County and subject to a poll tax: That the State of North Carolina and the Commissioners of said County duly levied upon said defendant for the year 1897, capitation taxes amounting, in the aggregate to $2.15 and placed the same in the hands of the Sheriff of said County for collection as required by the Machinery Act of 1897; that said defendant failed to pay said taxes on the first Monday of September, 1897, and failed to pay them on or before the first day of November, 1897; that the County of Rockingham is one of the Counties embraced in the second and last proviso contained in Section 36 of the Machinery Act of 1897, forbidding the Sheriff from levying on property before March 15th, and requiring him to attend during said month at one or more places in each township for the purpose of collecting unpaid taxes as stated in said proviso. If upon the foregoing facts the Court shall be of the opinion that the defendant is guilty, the jury so find; if the Court shall be of the opinion that the defendant is not guilty, the jury so find." His Honor being of the opinion that, upon the facts found by the jury, the defendant was not guilty so adjudged and ordered the discharge of the defendant, and the Solicitor for the State appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
No counsel *contra.*

MONTGOMERY, J.: The indictment was found at Fall Term, 1897, of Rockingham Superior Court which was convened on the 31st of October, and charged the defendant with a failure and refusal to pay his taxes for the year 1897, to the Sheriff of the County, on or before the 1st day of September, 1897, or on the first of November next following. The defendant was put on trial and the jury returned a special verdict. Upon the facts found in the verdict the Court pronounced judgment in favor of the defendant and the State appealed.

If there was a purpose to get a speedy decision by this Court upon the construction of Sections 52 and 53 of Chapter 168, Acts 1897 (an Act to raise revenue), a most unfortunate venue was selected for the trial of the indictment. We are happily relieved of the necessity of discussing that question in the matter now before us except to a very limited extent.

One thing is certain, among many other things uncertain, in the Machinery Act, and that is that all taxes shall be due on the first Monday in September in each year; and also that no collecting officer shall sell property for taxes before the first day of November next following; and indeed, in certain Counties of the State, not until after the 15th of March in the next year. The law cannot require impossibilities of its subjects, and, as it would be physically impossible for the tax collectors to receive the entire taxes due by all of the people of the whole State and for the tax payers to pay their taxes, in one day, the day on which they become due (the first of September), we must necessarily hold that the failure or refusal to pay taxes before the day on which the collector's right to sell begins, is not an indictable offence in contemplation of the Act. The County of Rockingham is one of the Counties in the State excepted from the general provisions of the Revenue Law as to the time at which taxes can be collected by distraint and sale. The Sheriff in that County cannot sell property for taxes until after the 15th of March following the September first on which the taxes became due. This being so, of course the defendant who is a citizen and tax-payer of Rockingham County, could not be lawfully indicted for the non-payment of his taxes until the 15th of next March, *if indeed he then could be*, (upon which question we express no opinion for the reason that the matter is not before us.)

If it was intended by this appeal to test the power of the General Assembly to discriminate between the different Counties of the State as to the times at which the people shall pay their taxes, it is to be observed that such laws have been common in our past legislative history, and they have not been assailed so far as we know on the ground that they were unconstitutional. The early marketing of the products of the Eastern Counties enables the people of those counties to pay their taxes earlier than the people of the Western Counties can conveniently pay theirs, because of the necessary lateness of the marketing of their chief crop. Such Statutes, although local, are still public laws. They affect everybody alike in the localities where they prevail and confer no exemptions or special privileges upon any. There is no violation of the principle of equation of taxation and the State, during the fiscal year, receives its revenue from all of its people under laws operating justly throughout the whole State.

Under the police power, the sale of liquor has been regulated by Statutes applicable to particular localities. *State* v. *Chambers*, 93 N. C., 600; *State* v. *Wallace*, 94 N. C., 827. Indeed, a Statute regulating the sale of cotton, as to hours of sale and quantities sold, in particular counties, has been held to be constitutional. *State* v. *Moore*, 104 N. C., 714.

The judgment pronounced by the Court upon the special verdict was correct and the same is affirmed.

Affirmed.

STATE v. JOHN A. AUSTIN et al.

Indictment for Forcible Trespass—Indictment, Sufficiency of—Convicted Criminal—Unauthorized Sentence by Court.

1. By Section 3 of Chapter 397, Acts of 1897, relating to Yancey County and other counties, it is provided that "no convicts shall be hired, sent or sentenced by any Court to work outside of their respective counties," while, by Chapter 501 the Commissioners of Yancey County are authorized to hire male convicts to adjacent counties to work on the public roads; *Held*, that the sentence by the Judge of the Superior Court of Yancey County, ordering a convict to work on the public roads in another County, was unauthorized and illegal.
2. It is not necessary to allege in a bill of indictment for forcible trespass that the prosecutor at any time forbade the defendant to enter upon the land or that he was put in fear, and thus failed to forbid such entry, by reason of the great numbers or by the force manifested.

INDICTMENT for forcible trespass, tried before *Adams, J.*, and a jury at Spring Term, 1897, of YANCEY Superior Court. The indictment was as follows:

"The jurors, &c., present that John A. Austin, H. L. Austin, late of Yancey County, on the first of December, 1896, with force and arms, &c., unlawfully and wilfully, forcibly, violently and with a strong hand did enter upon the premises of W. N. Phillips, and did there remain for a long space of time, *to-wit*: 30 minutes, cursing, abusing and assaulting the said W. N. Phillips and Hettie Phillips, with a rock weighing two pounds, and by rocking the house of said W. N. Phillips, the said W. N. Phillips being then and there present in the actual possession of said premises, against the form of the Statute, &c."

Defendants moved to quash the indictment on the following grounds:

1. For duplicity, in that the bill charged an assault upon W. N. Phillips and Hettie Phillips.
2. For that it charged an abuse to real property.
3. For that it charged a forcible entry upon real property.

The Solicitor stated that he elected to try and would try upon said bill as a bill for forcible trespass. Thereupon, defendants moved to quash the bill as a bill for forcible trespass, for that the allegations in the bill were not sufficient to constitute the offence, and that the same did not allege that the prosecutor at any time forbade the defendants or either of them to enter, and that the bill failed to allege that by reason of the great numbers or by the force manifested he was put in fear, and for that reason failed to forbid said entry.

The motion was overruled. There was a verdict of guilty, and the judgment rendered was as follows:

"It is ordered that Henry Austin go to the public roads of Buncombe County for 12 months. As to John A. Austin it appearing to the Court that this defendant at this term of the Court has been convicted for committing an assault with a pistol, and it further appearing that he is a notorious violator of the law and is a man of desperate character, the forcible trespass consisting in rocking a man's dwelling at night, the judgment of the Court is that this defendant go to the public roads of Buncombe County for three years."

From this judgment the defendants appealed.

Mr. Zeb. V. Walser, Attorney General and *Mr. J. T. Perkins*, for the State.

Mr. E. J. Justice, for defendants (appellants).

FAIRCLOTH, C. J.: The defendants were tried and convicted in the Superior Court of *Yancey* County, of a forcible trespass committed in said County. The sentence was that defendants go to the public roads of *Buncombe* County for the time specified in the judgment. The defendants appealed from the judgment on the ground that the Judge could not send them to work on the roads in another County.

The Act of 1897, Chapter 397, clothes the County Commissioners of Yancey County, and some others, with ample authority to work or hire out convicts of such Counties to work on roads and streets or any other work to save cost by requiring the convicts to work out fine and cost. Section 3: "That no convicts shall be hired, sent or sentenced by any Court to work outside of their respective Counties." The Act of 1897, Chapter 501, authorizes the Commissioners of Yancey County to work on the public roads any male person convicted of a misdemeanor and committed to the county jail, or hire said convicts to adjacent counties to work on public roads. From these Statutes it is patent that the Judge could not sentence these convicts to work on public roads, &c., in Buncombe County. He can only impose a fine or imprisonment in the county jail, and the Commissioners of Yancey are thereupon authorized by said Acts to make such arrangements as they may deem proper within the scope of said Statutes. The sentence was, therefore, illegal. The judgment is, therefore, reversed and the case sent back to the Court below for such judgment as the law allows. *State* v. *Lawrence*, 81 N. C., 522; *State* v. *Crowell*, 116 N. C., 1052. The motion to quash is without merit.

Remanded.

STATE v. J. L. GRAHAM.

Indictment for Arson—Lessee—Evidence, Admissibility of—Evidence of Collateral Facts.

1. An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within Section 1761 of *The Code* which declares that any tenant who shall injure any tenant house of his landlord by burning, or in any other manner, shall be guilty of a misdemeanor
2. It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a collateral offence will be heard to prove the intent of the offence charged; hence,
3. In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible.

INDICTMENT for arson, tried before *Greene, J.*, and a jury at July Term, 1897, of CATAWBA Superior Court. The indictment was as follows :

"The State of North Carolina, Catawba County, Superior Court, Spring Term, 1897. The jurors for the State, upon their oath, present: That James L. Graham, late of the county of Catawba, on the 5th day of March, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at and in the county aforesaid, unlawfully, wantonly, wilfully, maliciously and feloniously did set fire to and burn a dwelling house in the town of Newton, the property of A. J. Seagle and others, trustees of the Presbyterian Church, and their successors in office for Concord Presbytery, the said dwelling being known as the Manse of the Presbyterian Church in the town of Newton, North Carolina, and at the time of the said fire used as a dwelling by James L. Graham, as lessee, against the form of the Statute in such cases made and provided and against the peace and the dignity of the State.

"And the jurors for the State, upon their oaths aforesaid, do further present: That James L. Graham, of Catawba County, on the 5th of March, 1896, with force and arms, at and in said county, unlawfully, wantonly, wilfully, maliciously and feloniously a certain dwelling house situated in Catawba County, known as the Presbyterian Manse or Parsonage, in the town of Newton, the property of said Presbyterian Church, the legal title of which had been made to A. J. Seagle and others and their successors in office, and then and there used by said Graham as lessee, did, in the manner and form as aforesaid, did set fire to, burn and consume, against the form of the Statute in such cases made and provided, and against the peace and dignity of the State."

The State offered evidence tending to show that the Presbyterian Manse in Newton was burned on the 5th of March, 1896, about dark, and that the defendant had leased said house from the trustees of the Presbyterian Church in the summer of 1895, and at the time of the fire was still the tenant of the said trustees.

The State offered further evidence tending to show that the defendant had taken out policies of insurance on his furniture in the Manse for $700, and that the house was on fire on the 5th of March, 1896, about dark, soon after Graham and his family had locked and left the house to take a train for China Grove; that the property in the house was worth much less than the insurance on the property; that on the 8th day of May, 1895, while Graham had a cottage rented from Mrs. Fry, he secured a policy of insurance on his effects in the house for $800, representing them to the insurance company to be worth $1,100, and on the 20th of May, twelve days thereafter, house and contents were burned shortly after Graham and his family had left the house to attend the exercises at school in Newton.

State offered evidence of the above tending to show the similarity of the offences. Defendant objected to the testimony relating to the first fire. State insisted that circumstances as to the first fire were competent because the offences were similar. (Objection by defendant overruled, and defendant excepted.)

State also offered one Gaither, who testified that he had had a conversation with defendant about the fires, and witness asked him why he carried so much insurance, and defendant replied, "always insure for enough and you will get pay for what you lose;" and defendant told witness, also, in speaking of Mutual Benefit Society for sick benefits, that he wanted the largest he could get; that he did not want to go into it unless he could make something out of it. Defendant objected. (Objection overruled, and he excepted.)

As tending to show similarity of occurrences and the defendant's fraudulent intent, the State offered testimony that in May, 1896, soon after the second fire, the defendant took $10,000 accident insurance, paying a weekly benefit of $50 per week, unless injured by steam, and then $100 per week, and on the third day after getting this insurance he told the agent that he had shot his big toe, and claimed the insurance. Defendant objected to the above. (Objection overruled, and he excepted.)

There was a verdict of guilty and defendant moved in arrest of judgment, because there was no offence charged in the bill either under the Statutes or at common law.

The State's contention was that, if the offence charged is not punishable under Section 985 of *The Code*, it is punishable under 1761 of *The Code*. The Court held that the bill was good under Section 1761 of *The Code*. The defendant excepted to the ruling of the Court refusing to arrest judgment. Thereupon the Court rendered judgment that the defendant pay a fine of $300 and the costs. From this judgment the defendant appealed.

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. MacRae & Day and *Argo & Snow,* for defendant (appellant).

FAIRCLOTH, C. J.: The defendant was indicted for burning a dwelling house, the property of A. J. Seagle and others, trustees of the Presbyterian Church, used at the time of the burning as a dwelling by the defendant "as lessee." There were two counts in the indictment, each concluding against the form of the Statute in such cases made and provided and against the peace and dignity of the State.

The State introduced evidence to show that the dwelling was burned on the 5th of March, 1896, and that it was at that time the dwelling of the defendant and used by him as lessee of the owners.

The State also offered evidence tending to show that on May the 8th, 1895, the defendant occupied a rented cottage, the property of Mrs. Fry, and that after defendant had insured his effects, said cottage and contents were burned on May 20th, 1895. This evidence was admitted to show the similarity of the offences and defendant excepted.

After verdict of guilty the defendant moved in arrest of judgment, because there was no offence charged in the bill either at common law or under our Statutes. On the motion in arrest of judgment we were favored with an argument against the sufficiency of the bill as a common law offence, charging the defendant with arson. We will not stop to pass upon that question as the case falls easily within *The Code,* 1761, which declares that any tenant, who shall injure any tenement-house, &c., of his landlord, by burning or in any other manner, shall be guilty of a misdemeanor and fined or imprisoned at the discretion of the Court. Indeed, it is manifest to us that the bill, whether so intended or not, by its express terms is embraced by the language of the Statute. The indictment charges the defendant "as lessee," (*i. e.*, as tenant) of the landlord, and the trial, conviction and sentence, fortunately for the defendant, were had upon that view of the offence. The offence could not have been included under any of the sub-sections of *The Code*, 985.

We think that the exception to the admission of evidence tending to show the burning of the cottage on May 20, 1895, was well taken. Evidence of a distinct, substantive offence cannot be admitted in support of another offence, as a general rule. *State* v. *Shuford*, 69 N. C., 486; *State* v. *Alston*, 94 N. C., 930. If A steals a horse on January 1, and is indicted for stealing another horse on July 1, proof of the first taking is not competent on trial for the second stealing, as that would be proving a collateral offence. The State could not introduce such evidence on the question of defendant's character, unless he has put his character in issue.

To this general rule there is an exception, that is, when the evidence tends to prove *guilty knowledge* of the defendant, when that is an essential element of the crime, that is, the *quo animo*, the *intent* or design. Illustrations,—passing counterfeit money of like kind; sending a threatening letter, when prior and subsequent letters to the same person are competent in order to show the intent and meaning of the particular letter in question. In these and other instances, the evidence is admissible to prove the *scienter* only, and it must be excluded when it does not fall legitimately within the scope of the exceptions. *Rex* v. *Boucher*, 4 C. & P. 562; *Thorp* v. *State*, 15 Ala., 479; Wharton's Cr. Law, Section 650; *State* v. *Murphy*, 84 N. C., 742.

It is when the transactions are so connected or contemporaneous as to form a continuing action that evidence of the collateral offence will be heard to prove the *intent* of the offence charged. *State* v. *Jeffries*, 117 N. C., 727.

The defendant being charged with firing an outhouse, the State was permitted to prove that at the *same time* he made an attempt to fire a dwelling near it, the evidence directly connecting the defendant with the latter attempt. *State* v. *Thompson*, 97 N. C., 496.

There was error in admitting the evidence to which defendant excepted. No other exception need be considered.

New trial.

STATE v. THOMAS WILLIAMS.

Indictment for Assault with Intent to Rape—Trial—Evidence —Intent—Abandonment of Purpose.

1. Where, in the trial of an indictment for assault with intent to commit rape, it appeared that the defendant seized the prosecutrix, threw her upon the ground, put his hand over her mouth, pulled up her clothes, unbuttoned his pants and put his hands on her person and got upon her; that she forcibly resisted and accused arose because, as prosecutrix "supposed" she out did him; *Held*, that the evidence was sufficient to be left to the jury as to the intent charged and that it was not error to refuse an instruction that the jury could not convict the defendant of a greater offence than a simple assault.
2. On the trial of an indictment for assault with intent to commit rape it was not error to charge that "if the jury are satisfied beyond a reasonable doubt that the defendant laid hands upon the prosecutrix violently and against her will, for the purpose of having sexual intercourse with her, and that, at the time he so laid hands upon her, he intended to accomplish his purpose at all hazards in defiance of and notwithstanding any resistance she might make, then the defendant was guilty of an assault with intent to commit rape although he may have subsequently abandoned his purpose."

INDICTMENT for assault with intent to commit rape upon Lillie Caldwell, tried before *Starbuck, J.*, and a jury at Fall Term, 1897, of ALLEGHANY Superior Court. The facts sufficiently appear in the opinion. The defendant was convicted and appealed from the judgment of the Court, sentencing him to the penitentiary for a term of five years.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. R. A. Daughton, for defendant (appellant).

FURCHES, J.: This is an indictment for assault with intent to commit rape. The case discloses two grounds of exception: Whether there was sufficient evidence to carry the case to the jury; and, if there was,as to the correctness of the Judge's charge.

The prosecutrix, Lillie Caldwell, testified that she was sixteen years old; that she had started to a married sister's about four miles from home, that she had to pass through fields, across fences, and through old fields and woods; that on her way, in the afternoon of the 10th of May, 1897, "the defendant came on behind her in the path, and while going through the woods hallooed for her to wait, saying he had a picture and a letter for her; that when she got through a strip of woods and into a field she waited; that she was at the fence at the edge of the woods, and they went together through the old field, grown up with briers somewhat, and came to a fence at the edge of the corn field; that she was about to cross the fence, and laid her bundle on the fence and defendant took hold of the bundle; that they got over the fence and defendant sat down and said if she would come and kiss him he would give her clothes back to her and let her go, and she refused; that he then asked her to hug his neck and she refused; that he then asked her to sit on his lap and she refused; that defendant then caught her by the clothing and jerked her down in his lap; that she asked him to let her up and he would not; that he threw her over on the ground and got on her and pulled up her dress; that she hallooed and scuffled, and the defendant then put his hand over her mouth so that she could not halloo; that defendant then unbuttoned his pants and put his hand on her person; that she kicked and scuffled, and he got up. In response to a question as to why the defendant got up, the witness stated that she didn't know, but supposed that in the scuffle she out did him; that she got her bundle and started on, crying; defendant hallooed at her that she was foolish or crazy."

There was other evidence for the State that tended to some extent to corroborate the prosecutrix, but we do not think it necessary to quote it. The defendant was examined and denied that he committed the assault or that he touched her on that occasion.

At the conclusion of the evidence, the defendant asked the Court to charge "that from the evidence in the case, the jury could not convict the defendant of an assault with intent to commit rape, and could not find defendant guilty of a greater offence than a simple assault."

Defendant further contended "that from the facts and circumstances developed by the testimony there was no evidence fit to be left to the jury as to the intent charged; that the facts did not show that defendant intended to have intercourse with the prosecutrix at all events and notwithstanding any resistance on her part."

The Court refused to give the instructions as asked, and among other things charged the jury as follows: "That if they were satisfied beyond a reasonable doubt that the defendant laid hands on Lillie Caldwell violently and against her will, for the purpose of having sexual intercourse with her, and that at the time he so laid hands upon her he intended to accomplish his purpose at all hazards, in defiance of and not withstanding any resistance that she might make, then the defendant was guilty of an assault with intent to commit rape, although he may have subsequently abandoned his purpose."

Neither of the defendant's prayers for instruction could be given, unless it be upon the ground that there was no evidence, or no such evidence of the offence charged as should be allowed to go to the jury. The defendant in his prayers for instruction says there are "no such *facts* developed." We suppose he meant by this that there is no such evidence—as the *facts* are for the jury. The defendant's counsel argued it upon this ground and cited *State* v. *Massey*, 86 N. C., 658, and *State* v. *Jeffreys*, 117 N. C., 743, as sustaining his contention. But the evidence in this case is much stronger, in support of the Judge's leaving it to the jury, than it was in either of those cases. This case is nearer like that of *State* v. *Mitchell*, 89 N. C., 521, which fully sustains the action of the Court below in submitting the case to the jury. And the evidence for the State is stronger in this case than it was in Mitchell's case. While the Court did not give defendant's prayers as asked, it seems to us that the charge is correct and entirely fair to the defendant. Upon reading the whole testimony, it seems to us that the defendant offered evidence tending strongly to disprove the charge of the State, but that was all for the jury, and not for us. We cannot review the findings of the jury, but only the rulings of the Court upon questions of law.

There was one other exception taken as to the Judge's refusing to tell the jury what the punishment was upon a conviction for assault with intent to commit rape, and what was the punishment upon conviction for a simple assault. But this exception was properly abandoned here.

There is no error and the judgment must be affirmed.

Affirmed.

STATE *v.* L. F. GROVES.

Indictment for Illegal Sale of Liquor—Sale and Delivery—Interstate Commerce.

Where G., a resident of this State, living and doing business in a territory within which the sale of intoxicating liquors was prohibited, received at his home an order from a party living in another State for a certain quantity of whiskey at an agreed price and in pursuance of such order delivered the whiskey at a railroad station (also within the prohibited territory) for shipment to the purchaser at his home in another State; *Held*, that the transaction was a sale of liquor within the prohibited territory, and the question of interstate commerce does not affect the guilt or innocence of G.

INDICTMENT for selling intoxicating liquors within a prohibited territory, tried before *Hoke, J.*, and a jury at Fall Term, 1897, of GASTON Superior Court. The defendant was convicted and appealed. The facts appear in the opinion.

Mr. Zeb V. Walser, Attorney General, and *Messrs. Shepard & Busbee*, for the State.

Messrs. A. G. Maxwell and *Osborne, Maxwell & Keerans*, for defendant (appellant).

FURCHES, J.: The defendant is indicted for selling whiskey within less than two miles of Olney Church in Gaston County. It is admitted that Chapter 179, Acts 1885, prohibit, the sale of intoxicating liquors within two miles of said Church, and makes it a criminal offence to do so. It was shown that the defendant lives within about one half mile of said Church, and that he is the owner of a distillery at which he manufactured whiskey, but this distillery is more than two miles from the Church; that the defendant had a building at his home used by him for the "storage and sale" of his whiskey, and that this house was within about one-half mile of the Church.

The defendant testified that he resided at the railroad station, and that in February, 1897, and before the bill of indictment was found he received through the mail an order from one Morris, a resident of South Carolina, for four and three fourths gallons of whiskey, at an agreed price in money; that in pursuance of said order he shipped to said Morris a keg containing that quantity of whiskey; that this order was received by him at his home and he shipped the whiskey by the railroad from its station; that the place where he received the order, and the railroad station where he delivered the whiskey for shipment, were within about one half mile of said Olney Church.

The Court instructed the jury that, if they should find from the evidence that the defendant received the order and delivered the whiskey to the railroad within one-half mile of said Church, this was a sale of whiskey within the prohibited territory and the defendant would be guilty. The defendant excepted to this charge and contends that he is not guilty for two reasons; first, that the facts shown do not constitute a sale within the prohibited territory; and second, that the transaction was one of inter-state commerce and that he is protected by that.

It was not denied on the argument for the defendant but what the State, in the exercise of its police power, had the right to prohibit the sale of intoxicating liquor within two miles of this Church. *State* v. *Moore*, 104 N. C., 714. But this has been so often decided, and not being disputed by the defendant, we do not feel called upon to cite authority.

Then, did the facts shown constitute a sale within the prohibited territory? If they did, the charge of the Court was correct and the defendant was rightfully convicted, unless he is protected by the inter-state law as he claims he is. The order of Morris to the defendant was a proposition to buy, and the acceptance of this order constituted a contract—a sale by the defendant to Morris. *Pruden* v. *Railroad*, at this term. And the delivery by the defendant of the keg of whiskey to the railroad at its station for shipment to Morris, was a delivery and made Morris the owner of the whiskey. *Railroad* v. *Barnes*, 104 N. C., 25. The railroad being in such cases the agent of the consignee, a delivery to the railroad was a delivery to Morris.

It is the same in law as if Morris had sent his servant to the defendant, with an order and the money to buy a keg of whiskey, and the defendant had let the servant have the whiskey, and, if these had been the facts, it could hardly be contended that it was not a sale, though Morris did live in South Carolina. And though the servant carried it over the line into South Carolina to Morris, could it be that this would be such an interference with inter-state commerce as to prevent the defendant from being guilty of a violation of the criminal law of North Carolina? It was argued for the defendant that North Carolina cannot legislate for South Carolina—that its legislation is confined to its own territory. And so it is. But it would be strange if it could not enforce the criminal law within its own territory, because it had been violated in a transaction with a citizen of South Carolina.

It seems to us that what we have said is sufficient to show that the question of inter-state commerce has nothing to do with the guilt or innocence of the defendant, and for this reason we do not feel called upon to discuss the law of inter-state commerce.

There is no error and the judgment is affirmed.

Affirmed.

STATE v. MARION POWELL.

Indictment for Conspiracy to Procure Seduction—Evidence, Sufficiency of.

1 Conspiracy to seduce and defile a young unmarried woman is an indictable offence at common law.

2. The evidence recited in the opinion held to be sufficient to be submitted to the jury upon the question of defendant's guilt.

INDICTMENT for conspiracy to procure the seduction of a young unmarried woman, tried at Fall Term, 1897, of ASHE Superior Court before *Greene, J.*, and a jury. The indictment was as follows: "The jurors upon their oath present that Marion Powell and Lula Powell, late of the County of Ashe on the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms at and in the County aforesaid unlawfully and wilfully did between themselves conspire, combine, confederate and agree together, wickedly, knowingly and designedly, feloniously to procure by false pretenses, false representations and other fraudulent means, one Lilly Lawrance then being a poor child under the age of twenty-one years, *to-wit:* of the age of seventeen years, to leave her father's house without his consent, which said father had the legal control of her, the said Lilly Lawrence, for the purpose of prostituting her the said Lilly Lawrence and did prostitute her the said Lilly Lawrance against the form of the Statute in such case made and provided and against the peace and dignity of the State."

The defendant Marion Powell alone was tried. The evidence is summarized in the opinion of the Court. His Honor charged the jury that before they could convict the defendant they must be satisfied beyond a reasonable doubt from the evidence that the defendants conspired together between themselves to procure Lilly Lawrance to leave her home and go to Tennessee to the end that Marion Powell might prostitute her. Counsel for defendant asked the Court to instruct the jury that there was not sufficient evidence to warrant them in finding, beyond a reasonable doubt, that there was a conspiracy between the defendants and that they should acquit. This instruction was refused and defendant excepted. There was a verdict of guilty, and the defendant was sentenced to two years service upon the roads of Iredell County and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.

No counsel *contra.*

MONTGOMERY, J.: Marion Powell and Lula Powell were indicted for a conspiracy to procure the seduction and defilement of Lilly Lawrance, a young unmarried woman eighteen years of age, and living, just before the offence charged, with her father. The male defendant alone was tried. The defendant's first exception was to the sufficiency of the indictment, it having been insisted that the bill charged no offence. There is nothing in this exception. The matter was set out in approved form (Form 654, 2 Wharton Forms), and the offence charged was that of a conspiracy to seduce and defile a young unmarried woman, which is a crime indictable at common law. Wharton Am. Crim. Law, Sec. 2317; 2 McClain Crim. Law, Section 959.

The only other exception was to the refusal of his Honor to charge the jury, at the request of the defendant, that there was not sufficient evidence upon which they could reasonably find a verdict of guilty against the defendant. His Honor properly refused to give the instruction. There was evidence going to show that the prosecutrix was unmarried and eighteen years old and living with her father; that the female defendant was a married woman, her husband being the brother of the other defendant, Marion Powell, who himself was a married man; that the female defendant sent for the prosecutrix who lived a mile or more away, at her father's house, to come to her house to help her about some house work; that after she arrived the defendant Marion told her that if Joe, his brother, and the husband of Lula, did not pay her for her work, he would; that during the week she stayed at the female defendant's house, and repeated importunities were made by the defendants to the prosecutrix that she would go with them to the store of Marion in Tennessee, about ten miles off; that the defendants were constantly engaged in close conversation with each other, and immediately afterwards would try again to persuade the prosecutrix to go with them to Tennessee; that finally the prosecutrix consented to go, she and the defendant Lula taking one road, and Marion another, and meeting after they had gotten out of the neighborhood; that after they got to Tennessee the defendant Marion had intercourse with the prosecutrix.

There is a good deal more of such testimony, and certainly there was enough to have been submitted to the jury on the question of the defendant's guilt.

No error.

STATE ex rel Solicitor v. N. JENKINS, et al.

Scire Facias—Appearance Bond—Breach—Record, Amendment of.

1. When one appears in Court, in obedience to the requirement of his bond, and submits himself to the jurisdiction of the Court, he continues under the penalty of the bond until the trial is terminated or until he is discharged by the Court.
2. Where a criminal case before a Justice of the Peace was not concluded on the day set for trial, and was postponed to a subsequent day, defendant's bond to appear on the day set for trial bound him to appear on the day to which the adjournment was made.
3. Where defendant, who was under bond to appear before a Justice of

the Peace for trial, failed to appear, and the Justice caused him to be called and entered the default on the docket, but failed to enter it on the bond as required by Chapter 133, Acts of 1889; it was not error, in the trial of an action on the bond, for the Court, upon ascertaining the facts, to require the Justice of the Peace, who was present, to make the proper entry on the bond of defendant's default such direction being merely for the purpose of perfecting the record.

4. Where the record in the trial of an action on an appearance bond did not show that a judgment *nisi* had been entered against the principal in the Superior Court, it was not error for the Court, on ascertaining that such judgment had been taken to require the record to be amended so as to show that fact.
5. It is not necessary to issue a *scire facias* returnable to the next term of a Court after the judgment *nisi* is taken on an appearance bond

ACTION by the State of North Carolina on the relation of the Solicitor, against N. Jenkins and others on a bond for the appearance of defendant Larkin Jenkins before a Justice of the Peace, tried before *Hoke, J.*, and a jury, at Spring Term, 1897, of CALDWELL Superior Court. There was judgment for the plaintiff and defendants appealed.

Mr. Zeb V. Walser, Attorney General, and *Mr. W. C. Newland*, for the State.

Messrs. W. H. Bower and *Edmund Jones*, for defendants (appellants).

FURCHES, J.: The defendant, Jenkins, and others were arrested on a warrant issued by one Ballew, a Justice of the Peace, upon a charge of burning a mill house of one Connelly. Upon affidavit of defendants the case was moved for trial before E. B. Phillips, another Justice of the Peace, on the 9th of November, 1895, fixed for the time of trial. The defendant, Larkin Jenkins, was required by the Court to enter into bond in the sum of one thousand dollars for his appearance before said Phillips on the 9th of November, and in lieu of personal surety, the defendant, Nicholas Jenkins, and his wife Robena, executed a mortgage in the penal sum of one thousand dollars for the appearance of the defendant

Larkin, on the 9th of November, before said Phillips to answer the charge, and that he should not depart the Court without leave thereof. On the 9th, the day fixed for the trial, the defendant Larkin appeared and the trial proceeded before said Phillips. But not being able to conclude the trial on that day, its further hearing was postponed by the Justice until Saturday, the 16th of November, 1895.

At the time of this adjournment the State had concluded its evidence and the defendants were proceeding with their evidence. There was no express stipulations as to whether the defendant, Larkin, would be held under the mortgage for his appearance on the 16th, or not. But the defendant was present in Court when the further hearing of the case was postponed until the 16th, and offered no objection to this order of postponement.

The defendant, Larkin, did not appear on the 16th and the Justice caused him to be called out and entered the default on his docket, and forwarded the papers and the mortgage to the Clerk of the Superior Court. The Clerk placed the case on his docket, and at the next Term of the Superior Court the defendant, Larkin, was called and failed and judgment *nisi* entered against him. The Clerk issued a *sci fa* against Nicholas Jenkins and wife, Robena, on the 16th of April, 1897, which was returned duly executed, May 31, 1897.

The bond and mortgage, returned to the Superior Court by Phillips, the Justice of the Peace, did not have entered thereon the forfeiture of the defendant, Larkin Jenkins, as required by the Act of 1889, Chapter 133. But it was admitted that Larkin Jenkins was called and failed to appear on the 16th, the adjourned day of the trial, and that the Justice made entry thereof on his docket. Upon this admission, the Court directed the Justice, who was present, to make the proper entry on the bond and mortgage, which was then and there done in open Court, and defendant excepted.

The Minute Docket did not, at the time of trial, show that judgment *nisi* had been taken against the defendants at Spring Term, 1896, or at any other time. But, that on an inspection of the Clerk's journal and the entries of the day's proceeding, and on the evidence of the Clerk and others, duly taken, the Court was convinced that such judgment was had at said time, and that it was an erroneous omission that the criminal docket did not show the same, then and there found as a fact, that such judgment was had at said term, and directed that the record be amended so as to show the same, which was done, and defendant excepted.

"On the facts admitted and those found by the Court, the Court was of the opinion that the failure of Larkin Jenkins to appear on the 16th of November, this being the adjourned day of trial, was a breach of his bond and mortgage and directed the jury to return the verdict as shown in the record. And the Court also found the facts as declared in the verdict. Defendants excepted.

The defendants appealed and assigned as error—

1. That the Court directed the Justice of the Peace to make the entry "called and failed on the bond and mortgage."

2. That the Court directed the amendment of the criminal docket so as to show judgment *nisi*.

3. For holding that the bond and mortgage, to appear on the 9th, required Larkin to appear at the adjourned meeting on the 16th.

4. For that the Clerk having jurisdiction to try said action failed to enter judgment *nisi* and that no notice issued to defendants to appear at the next Term of the Court.

The exceptions of defendants appear to be technical in their character. But defendants are entitled to have them duly considered, and if they are well taken they are entitled to have the benefit of them. Much of the law is technical in its nature. It is too well settled law to call for argument or citation of authority to show that defendant's bond to appear on the 9th did not bind him to appear on the 16th, nothing else appearing. But to treat the case upon this stipulation alone, without considering the other facts connected with the case, would be a very imperfect consideration of the matter. A Court of a Justice of the Peace has no stated terms, and is to be held on a day certain to be fixed by the Justice. But it often happens that the investigation of one case can not be concluded in one day and, if the Court could not postpone the further hearing to another day, all that had been done would be lost. Suppose the further hearing had been postponed until the next morning, (the 10th), will it be contended that the defendant would not be bound to attend on that day, or forfeit his bond? And if he would, what rule marks the distinction between that and the 16th? The rule must be that when he appears in obedience to the penalty of his bond, and submits himself to the jurisdiction of the Court, he continues under its penalty until the trial is terminated, or until he is discharged by the Court.

This rule is both for the protection of the State and for the benefit of the defendant—to relieve him from the trouble and expense of giving a new bond, and, as in this case the trouble and expense of executing a new mortgage. *State* v. *Smith*, 66 N. C., 620.

Until 1889, the defendant could not have given bond for his appearance, and would have been held in custody from the time of his arrest until he was discharged by the Court. *State* v. *Jones*, 100 N. C., 438. And this act, now Section

120 of *The Code*, as amended by Chapter 425, Acts 1891, authorized the defendant to give a mortgage as security.

But it was the duty of the Justice, upon the defendant's failing to appear, to cause him to be called, and to note his failure to answer on the bond, and to return or send the bond with entry to the Clerk of the Superior Court of his County. The Justice caused the defendant to be called and entered the default on his docket, but failed to enter this failure on the bond. He sent the bond to the Clerk, but without this entry.

The Court, upon ascertaining the fact that the defendant *was called and failed to answer* and that the Justice had noted this fact on his docket, directed the Justice, who was present, to make the entry on the bond. To this the defendant excepted, and contended that this was a penal Statute and should be strictly construed. But in this, it seems to us, the defendant is mistaken. It is not a penal Statute but an enabling Statute, passed for the benefit of defendants, and should receive a liberal construction at the hands of the Courts.

But the direction of the Judge was only to perfect the record—to supply an entry of an admitted fact, that the defendant had been called and failed—to make the record speak the truth. This has been the practice, within the knowledge of some of the members of the Court, for many years and is authorized by Section 908 of *The Code*, and sustained by *Sims* v. *Goettle*, 82 N. C., 268; *State* v. *Vaughan*, 91 N. C., 532; *State* v. *Crook*, Ibid, 536; *State* v. *Smith*, 103 N. C., 410.

For the same reasons and authorities, the Court was authorized to have the minutes of the Superior Court corrected so as to speak the truth and to show that there had been a judgment *nisi*, though not entered.

There is nothing in the objection that no *sci fa* issued returnable to the next succeeding term of Court after the judgment *nisi.* We were cited to no authority for this position, and we see no reason to sustain it. The practice has been the other way.

The judgment of the Court below is affirmed.

Affirmed.

STATE v THOMAS CALL.

Indictment for Practicing Medicine in Violation of Law—Physicians—Certificate of Competency—Statutes, Constitutionality of—Fourteenth Amendment—Statutes, Repeal of—Indictment, Sufficiency of.

1. The Legislature has an unquestioned right to require an examination and certificate as to the competency of persons desiring to practice medicine or to exercise other callings affecting the public and requiring skill and proficiency.
2. The fact that a Statute, requiring such examination and certificate, exempts from its requirements physicians already practicing in the State at the date of its passage does not make the Statute invalid as creating a monopoly or conferring special privileges, since it is only the exercise of the police power to protect the public from impostors and incompetents.
3. Nor does such Statute violate the Fourteenth Amendment of the Constitution of the United States prohibiting any State from denying to any person the equal protection of the laws, since such amendment does not restrict the powers of the State when the Statute applies equally to all persons in the same class, and the State is usually the judge of the classification.
4. Section 5 of Chapter 181, Acts of 1889, making it a misdemeanor to practice medicine without first having registered and obtained a certificate from the Clerk of the Superior Court, is not in conflict with and hence does not repeal Section 2 of Chapter 117, Acts of 1885, making it a misdemeanor to practice medicine for fee or reward without first having obtained a license from the Board of Examiners.
5. Upon an indictment under Acts 1885, Chapter 117, Section 2, which makes it a misdemeanor for any person to practice medicine for fee

or reward without a license, a special verdict; which does not find that defendant practiced "for fee or reward," will not justify a conviction.

6. Under Acts 1889, Chapter 181, Section 5, making it a misdemeanor to practice medicine without first having registered and obtained a certificate, an indictment which does not charge that defendant did not register, and obtain a certificate, as required, is defective.
7. Such indictment need not charge that defendant practiced "for fee or reward."
8. An indictment under Acts 1889, Chapter 181, Section 5, making it a misdemeanor to practice medicine without first having registered, and obtained a certificate, need not charge that defendant does not belong to one of certain classes which are withdrawn from the operation of the Statute by a proviso thereto.

INDICTMENT for practicing medicine without license, &c., tried before *Starbuck, J.*, and a jury at Fall Term, 1897, of WILKES Superior Court.

The indictment was as follows: "The jurors for the State upon their oaths present that Thomas Call, late of the County of Wilkes, on the first day of August, 1896, at and in said County, not being a woman pursuing the avocation of midwife, and not being a regular licensed physician or surgeon resident in a neighboring State and not having a diploma from a regular medical college and practicing medicine and surgery in this State prior to March 7, 1885, did unlawfully and wilfully begin and engage in the practice of medicine and surgery and the branches thereof for fee and reward without having obtained license so to do from the Board of Medical Examiners of the State of North Carolina, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State."

On the trial the jury returned a special verdict as follows:

"That Thomas Call, the defendant, for ten years prior to this indictment, has practiced medicine in the Counties of Ashe and Watauga. That he is and has been a competent and successful physician, that he has not obtained a certificate from the State Board of Medical Examiners, and did not practice medicine prior to March 7th, 1885, and has no diploma from any regular Medical College. That within the two years immediately preceding the finding of this bill of indictment, he has practiced medicine in the family of Jacob Michael. We further find that the said Thomas Call has paid to the Sheriff of Ashe County the taxes prescribed for physicians by the Acts of 1895 for the years of 1895 and 1896 as evidenced by receipts.

If upon the facts the Court should be of the opinion that the defendant is guilty, then we find him guilty, but if upon the foregoing facts the Court should be of the opinion that the defendant is not guilty, then we find him not guilty."

His Honor, upon this verdict, held that the defendant was guilty, and adjudged that he pay a fine of ten dollars.

Defendant excepted to the ruling of the Court that the defendant upon special verdict was guilty and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.

Mr. W. H. Bower, for defendant (appellant).

CLARK, J.: The defendant is indicted for practicing medicine in violation of *The Code*, Sections 3122 and 3132 as amended by Acts 1885, Chapters 117 and 261, by Acts 1889, Chapter 181, Sections 4 and 5, and by Acts 1891, Chapter 420. His counsel earnestly contends that the law, as it stands, is contrary to Article I, Section 7, of the State Constitution, which forbids exclusive privileges and emoluments to any set of men, and to Section 31 of the same Article, which prohibits monopolies and perpetuities, and, further, that it is obnoxious to the 14th Amendment to the Constitution of the United States, which prohibits any State to deny to any person the equal protection of the laws. That the Statute is not in violation of the State Constitution is thoroughly discussed and held in *State* v. *VanDoran*, 109

N. C., 864. It is not to be questioned that the law making power of a State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine; *Eastman* v. *State*, 109 Ind., 278; *State* v. *Dent*, 25 W. Va., 1, affirmed in 129 U. S.,114; or dentistry, *Wilkins* v. *State*, 113 Ind., 514; *People* v. *Phippin*, 70 Mich., 6; to teach, to be druggists, pilots, engineers or exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency. Cooley Torts, 289; Cooley Const. Lim. (6th Ed.) 745, 746; Tiedeman Police Power, Section 87. To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. The door stands open to all who possess the requisite age and good character and can pass the examination which is exacted of all applicants alike.

The defendant, however, contends that the Statute is unconstitutional on the additional ground that it exempts from its requirements those physicians who were already practicing medicine and surgery in this State on March 7, 1885. The first Statute, making it indictable to practice medicine and surgery without an examination by the State Board of Medical Examiners and a license therefrom, was enacted at the session of 1885 and was made prospective so as to apply only to those who should begin the practice of medicine and surgery thereafter. This was not unreasonable. It was fair to assume that those already in the practice, many of whom had grown gray in the service of humanity and the alleviation of suffering, had already received that public approbation which was a sufficient guarantee of their competency, and should not be needlessly subjected to the humiliation of an examination by the side of beardless boys, who had not yet swung a scalpel or prescribed a purgative save under supervision; while those already in practice who had, however, proved incompetent, it might be assumed, had been equally stamped with public disapproval at the cost to the public of much bitter experience—an expensive and dangerous process of distinguishing the two classes to save the public from which, in future, was the object of the new regulation requiring examination and license by a Board of competent examiners. When the Act of 1889 was enacted it recognized that the new legislation had been prospective by the Act of 1885; accordingly 7th March, 1885, was made the dividing line, those practicing medicine and surgery before that date being left to the test of the public approval or disapproval acquired by them, and those beginning practice since that date, having presumably knowledge of that Statute, were required to undergo the examination and obtain the license exacted by it.

The Statute bearing alike upon all individuals of each class is not a discrimination forbidden by the State Constitution nor by the 14th Amendment. *Broadfoot* v. *Fayetteville*, at this term. It has been frequently adjudged by the Supreme Court of the United States that the 14th Amendment does not restrict the powers of the State when the Statute applies equally to all persons in the same class, and that ordinarily the legislature is the sole judge of the classification. *Slaughter House Cases*, 83 U. S., 36; *Missouri* v. *Lewis*, 101 U. S., 22; *Barbier* v. *Connelly*, 113 U. S., 27; *Hayes* v. *Missouri*, 120 U. S., 68; *Railroad* v. *Mackey*, 127 U. S., 205; *Walston* v. *Nevin*, 128 U. S., 578; *Bell* v. *Penn.*, 134 U. S., 232; *Express Co.* v. *Seibert*, 142 U. S., 339; *Giozza* v. *Tireman*, 148 U. S., 657; *Columbia R. Co.* v. *Wright*, 151 U. S., 470; *Lowe* v. *Kansas*, 163 U. S., 81; *Railroad Co.* v. *Matthews*, 165 U. S., 1. *In re Kemmler*, *supra*, Fuller, C. J., pointedly says: "The 14th Amendment did not radically change the whole theory of the relations of the State and Federal

Governments to each other and of both Governments to the people." In the *Slaughter House Cases, supra*, is the fullest and best discussion of the object and scope of that amendment. Doubtless there might be a classification made by the Legislature which would be only colorable and, in truth, would plainly be a discrimination conferring special privileges or denying the equal protection of the laws, but such is certainly not the case here. A classification of physicians practicing before the Act and of those beginning thereafter, and distinguishing between those having the diplomas of a Medical College and those not, was held to be reasonable and within the legislative discretion. *State* v. *Dent, supra*; *Ex Parte Spinney*, 10 Nevada, 328; *West* v. *Clutter*, 37 Ohio, 347; *People* v. *Phippin*, 70 Michigan, 25; *Hewitt* v. *Charis*, 16 Pick. (Mass.) 356; *State* v. *Medical Board*, 32 Minn., 324; *State* v. *Randolph*, 17 L. R. A.

The defendant, however, further presents technical objections which he is entitled to have noticed. Section 5 of Chapter 181, Acts 1889, does not repeal Section 2, Chapter 117, Acts 1885, and not being in conflict, both Sections stand, and the defendant could have been indicted under either Act. The indictment is sufficient under Section 2, Chapter 117 of the Acts 1885, but the special verdict in that view is defective, as it does not find that the defendant practiced, "without fee or reward," and the defendant properly excepted that it did not justify an adjudication that the defendant was guilty. If indicted under Section 5, Chapter 181 of the Acts 1889, it was not necessary to allege or prove that the defendant practiced without fee or reward, but the defendant insists that the indictment is defective in that it does not contain the negative averment in said Section "without having registered and obtained the certificate as aforesaid." This point of the insufficiency of the indictment was not presented below, but is one of those which can be taken for the first time in this Court. Rule 27. The Act of 1889 requires a "registration and certificate" which is not exacted by the Act of 1885. An indictable offence is charged but not found by the special verdict, if the indictment is under the Act of 1885, while it is found by the verdict, but not charged, if the indictment is under the Act of 1889, and the judgment must be arrested. An approved form of indictment under the Act of 1889 may be found in *State* v. *VanDoran*, 109 N. C., page 864, except that the words "or a diploma issued by a regular Medical College prior to the 7th March, 1885," should be stricken out as, by the Act of 1891, Chapter 420, that fact will no longer authorize registration, and of course the concluding words "against the peace and dignity of the State and contrary to the Statute," &c., are now mere surplusage. *State* v. *Kirkman*, 104 N. C., 911; *State* v. *Harris*, 106 N. C., 682. It is not necessary to insert a negative that the defendant does not belong to one of the classes named in the proviso to Section 5 (Chapter 181, Acts 1889), as its insertion is not required to charge the offence, for the proviso merely withdraws certain cases from its operation, *State* v. *Norman*, 13 N. C., 222; *State* v. *Melton*, 120 N. C., 591, 596; it would be otherwise if the negation, (even if it had been contained in a proviso) was necessary to constitute the offence, as was the essential averment which was omitted from this bill that the practicing medicine was "without the registration and certificate required by law." Wharton Cr. Pl. & Pr. Sections 238, 239 (9th Ed.)

Judgment arrested.

STATE v. HIRAM WILSON.

Indictment for Conspiracy—Marriage, Validity of—Indictment—Duplicity—Trial—Evidence—Instructions—Sentence—Appeal—Record.

1. It is not improper for the trial Judge, in sentencing a person convicted of an offence, to recite in the judgment, as a reason for the severity of the sentence, the many offences of which the defendant has been previously convicted.

2. An indictment charging three defendants with having conspired to procure sham marriages between two of them and two women is not bad for duplicity.

3. Duplicity in a bill of indictment is ground only for a motion to quash and, being cured by verdict, is not ground for a motion in arrest of judgment.

4. While consent is essential to marriage in this State it is not the only essential but it must be acknowledged in the manner and before some person prescribed by Section 1812 of *The Code.*

5. A marriage pretendedly celebrated before an unauthorized person being a nullity and not capable of being legalized by consent, a conspiracy to procure sexual intercourse with a woman through such pretended marriage is an indictable offence.

6. The objection that there is no sufficient evidence to go to the jury against defendants on trial is not ground for a motion in arrest of judgment, which can only be based upon defects apparent upon the face of the record.

7. An exception that there is no evidence against defendants on trial sufficient to go to the jury is too late when taken after verdict

8. Where the error complained of is the refusal of a prayer for instruction that there was no evidence to go to the jury against the defendant, it is the duty of the appellant to justify his prayer by showing that there was no such evidence, either by stating that as a fact in his case on appeal or by setting out the evidence therein and showing thereupon that there was really no evidence on the material point.

9. Where the State's solicitor agrees that the trial Judge's notes of the testimony shall be a part of the record on appeal and such notes are incomplete, but are the only record of the evidence, he is bound by the insufficiency of the evidence shown thereby.

INDICTMENT for conspiracy to procure a fraudulent marriage in order to encompass the seduction and defilement of two women, tried before *Adams, J.*, and a jury at Spring Term, 1897, of YANCEY Superior Court. The indictment was as follows:

"The jurors, etc., present that Plato Ray, Hiram Wilson, and William Fender, etc., on the first day of March, 1896, with force and arms, etc., unlawfully and wilfully and feloniously did conspire, combine, confederate, and agree together, wickedly knowingly, falsely, feloniously, and designedly, to procure, by false pretenses, false representations, and fraudulent means, Hattie Phillips and Hettie Phillips to allow Plato Ray and Hiram Wilson to have illicit carnal connection with them, by going through a sham marriage, and seducing them, the said Hattie Phillips and Hettie Phillips, to believe it to be a real *bona fide* marriage; and, by said unlawful, wilful, and felonious conspiracy so entered into by Plato Ray, Hiram Wilson, and William Fender, said sham marriage was procured, and said Hattie and Hettie Phillips carnally known by said Plato Ray and Hiram Wilson, to the great damage of the said Hattie Phillips and Hettie Phillips, and to the evil example of all good citizens, against the form of the Statute, and against the peace and dignity of the State."

From the fragmentary and incomplete statement of the evidence it appears that Hattie Phillips, witness for the State, testified that the defendant Ray came to her and told her that he had a license for their marriage, they being then engaged to be married; that they then went to the house of the defendant Fender and told him they wanted to go to a magistrate, that Fender said J. A. Austin was a magistrate and thereupon they all went to Austin's house and witness and Ray were married by Austin; after returning to Fender's witness learned that they were not married and witness started home, the defendant Wilson, with a sister of the witness, accompanying her a part of the way. Witness stated that she went to Austin's to be married and thought she was married until Austin said "this will ruin us."

J. A. Austin, witness for the State, testified that Hattie Phillips and defendant Ray came to his house about 10 o'clock at night in company with the defendant Wilson, Will Fender and his wife and others, and wanted to know whether he could marry them and he replied that he could marry them for fun; that he then went through some sort of a ceremony; that he was not a Justice of the Peace. He further testified "Mary Edwards was with the crowd and she is a prostitute. After the ceremony I went to Sid Phillips. I reckon Hattie heard me say I had no license; she was standing in the door. I guess they all understood that it was all in fun. The father of Hattie had us up before a Justice of the Peace and we compromised by paying him $30.00. I and Ray paid Phillips $15.00."

The mother of Hattie testified that her daughter came home next morning "when the chickens were crowing;" that Hattie was not in the habit of going out at night and never went to school a day in her life.

A witness for the defendants testified that he saw Hattie the next morning after the alleged marriage; that she was crying and that, in reply to a question whether she was married, she said the boys said she was married—that Austin married her and Ray;—that the parties had told her she was going to get married but she didn't believe she was for she knew Austin couldn't marry any one.

Defendants moved in arrest of judgment (1) for that the bill was void for duplicity, in that, if any offence at all was charged, the defendants were guilty of two separate and distinct offences; (2) that the bill did not charge the defendants with the intent to commit any felonious crime known to the law of the State; (3) that there was no evidence sufficient to go to the jury as to the guilt of Hiram Wilson, no witness having testified that he was a party to any fraud or the procurement of any sham marriage between the defendant Plato Ray and the prosecuting witness Hattie Phillips; (4) that there was no testimony that the defendants Plato Ray or Hiram Wilson intended to have illicit intercourse with the prosecutrices, Hattie or Hettie Phillips, or that they had such intercouse with either of them. Defendants also moved in arrest of judgment the fact that his Honor failed to charge as prayed for by them, as follows, *to-wit:* (1) "That there is no evidence of conspiracy between the defendants, and no assent to do any unlawful act. (2) Before you can find the defendants guilty as charged, you must find beyond a reasonable doubt that the defendants, by assent and confederation between themselves, conspired to deceive the said Hattie Phillips by a mock marriage, and that she was deceived." These charges his Honor refused to give. The defendants further excepted to his Honor's charge, for that he charged the jury that it was no defence even if Austin, the man who performed the ceremony between Plato Ray and Hattie Phillips, was a Justice of the Peace or was authorized to solemnize marriages.

His Honor rendered the following judgment:

"It appearing to the Court, as to Wilson, that at the last Term of this Court this defendant was indicted for an assault with a pistol by shooting a man named Shook through the arm; and it further appearing that the defendant at the same term of the Court was indicted for carrying a pistol and upon both of said charges the defendant plead guilty; and it further appearing to the Court that this defendant is a notorious violator of the law and openly defies the law and its process and at the last time of the Court he was allowed to plead guilty and the judgment was suspended in accordance with an agreement with the solicitor of this District and that, too, in the absence of counsel who had been employed to prosecute this defendant and after the prosecuting witness, who had been shot through the arm and his arm broken, had been discharged by the solicitor and told that he need not appear until this Term of the Court; and it further appearing that said shooting was without justification or provocation; the judgment of the Court is that this defendant be put upon the public roads of Buncombe County for a term of three years. From this judgment defendant Wilson appealed.

Mr. Zeb V. Walser, Attorney General, and *Mr. J. T. Perkins,* for the State.

Mr. E. J. Justice, for defendant (appellant).

CLARK, J.: The defendants, Plato Ray, Hiram Wilson and Will Fender, are charged with a conspiracy to procure Hattie Phillips and Hettie Phillips to have carnal intercourse with said Ray and Wilson through sham marriages celebrated before a person not authorized, and thereby seducing the women named through their belief that it was a valid marriage.

The indictment is very inartificially drawn, though as to form its defects are probably cured by *The Code*, Section 1183. The objection that the Judge, in sentencing Wilson to three years on the public roads, recited as reasons for the severity of the sentence the many offences of which he had been theretofore convicted, and his general bad character, is not well taken. Such matters ought justly and properly to be considered, as well as, on the other hand, a defendant's previous good character in lightening the sentence to be imposed. In England and some of the States of this country there is an "Habitual Criminals" Act which requires heavier sentences for such offenders. Whar. Cr. P. L. and Pr. §934 (9th Ed.); 1 McClain Cr. L., 528; *Moore* v. *Missouri*, 159 U. S., 673.

The first ground of the motion in arrest of judgment that the bill is bad for duplicity cannot be sustained. It is true that the joining of two separate offences in the same count is bad for duplicity (*State* v. *Cooper*, 101 N. C., 684) or the charging different persons with different offences in the same indictment (*State* v. *Hall*, 97 N. C., 474,) both cited with approval in *State* v. *Harris*, 106 N. C., 682, but here the three defendants are charged with one and the same offence, *to-wit:* conspiracy to procure certain persons to be duped into illicit carnal intercourse. A charge that A stole the property of C and that B stole the property of D is bad for duplicity if made in one bill, but the charge that A, B and E conspired to steal the property of C and D and that C's property was to be carried off by one conspirator and D's property by another, is not bad for duplicity, since the offence charged is not the larceny, which would be separate and distinct offences, but the conspiracy which is a single offence participated in by all. 2 McClain, *supra*, § 978. Besides, duplicity is ground only for a motion to quash. Being cured by the verdict, it cannot be used as ground for a motion in arrest of judgment. Whar., *supra*, §§ 255, 760.

As however the case must go back for other reasons, the Solicitor may consider whether it is not advisable to send a more carefully drawn bill and whether it would not simplify the trial to send two bills, one charging the conspiracy to deceive Hattie Phillips by a sham marriage and the other charging a conspiracy to deceive her sister by a similar device.

The second ground in arrest of judgment is that no offence is charged. It was urged that consent makes marriage and, therefore, though the person solemnizing it was neither "an ordained minister or a Justice of the Peace," (nor was the marriage according to the customs of the Society of Friends) as provided in *The Code*, Section 1812, it would be a valid marriage. Such is not the law in North Carolina. Consent is essential to marriage but it is not the only essential. 14 Am. & Eng. Enc., 472, note 3. In this State it must be acknowledged in the manner, and before some person, prescribed by the Section of *The Code* just cited. No celebration was required by The Canon Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many States in this Union. In some States the question has never been decided. In other States celebration before some person authorized by law is held essential, as (after some hesitation) has been held to be the common law in England. Stewart Marriage & Div., Section 90; 14 Am. & Eng. Enc., 515. In the latter class is North Carolina.

There is no such thing as marriage simply by consent in this State. Ruffin, C. J., in *State* v. *Samuel*, 19 N. C., 177, and *State* v. *Bray*, 35 N. C., 290; Gaston, J., in *State* v. *Patterson*, 24 N. C., 346; Pearson, C. J., in *Cooke* v. *Cooke*, 61 N. C., 583, and the same is recognized as the law in the more recent cases of *State* v. *Parker*, 106 N. C., 711, and *State* v. *Melton*, 120 N. C., 591. In *State* v. *Bray*, *supra*, Ruffin, C. J., in an interesting discussion tracing our marriage law shows that, originally in this Colony, valid marriages could only be solemnized by ministers of the Church of England (with the result, as we now know from the "Colonial Records" that a large part of the population were not legally married, owing to the scarcity of such ministers). In 1715, Ch. 1, reciting the inconvenience from scarcity of ministers of the established Church, authorized the Governor of the Colony to solemnize marriages; then in 1741, Chapter 1, empowered Justices of the Peace to perform the ceremony; in 1766, Ch. 9, the privilege was extended to ministers of the Presbyterian Church, and at last, in 1778, Ch. 7, to ministers of all other denominations, and marriages according to the custom of the Society of Friends were also made valid. This last, made a little broader, is now *The Code*, § 1812. *State* v. *Parker*, 106 N. C., 711.

From this summary, it may be seen that a marriage pretendedly celebrated before a person not authorized would be a nullity, and a conspiracy to procure a woman to submit herself to the embraces of a man by false and fraudulent representations that the officiating person had authority to solemnize the rites of matrimony would be a conspiracy to do an unlawful act, and indictable. *State* v. *Younger*, 12 N. C., 357; 2 McClain, *supra*, § 959.

State v. *Brown*, 119 N. C., 825, merely held that where a private citizen celebrated a marriage between a man and woman with their consent, no fraud or conspiracy being charged, it was not indictable. That is a very different matter from the charge here. In the case stated in *State* v. *Brown*, the ceremony was a nullity and the man and woman living together on the strength of it would have been indictable for fornication and adultery, but there being nothing charged against the person officiating beyond his want of authority there was no criminal offence as to him.

The third and fourth grounds in arrest of judgment are that there was no evidence sufficient to go to the jury against the defendants. These are not matters to be urged in arrest of judgment which can only be based upon defects upon the face of the record, and treated even as an exception it is too late when taken after verdict. *State* v. *Harris*, 120 N. C., 577, citing *State* v. *Kiger*, 115 N. C., 746; *State* v. *Hart*, 116 N. C., 976; *Holden* v. *Strickland*, 116 N. C., 185; *Sutton* v. *Walters*, 118 N. C., 495; *Riley* v. *Hall*, 119 N. C., 406; *State* v. *Leach*, Ibid, 828, and other cases.

The fifth ground in arrest of judgment is that the Court declined to charge as prayed that there was no evidence of conspiracy between the defendants, and no agreement to do an unlawful act. This is certainly not ground in arrest of judgment, but we may treat it as an exception for refusal to charge. The burden was on the appellant to justify his prayer by showing that, in truth, there was no evidence, either by stating that as a fact in his case on appeal or setting out the evidence in his statement of the case and showing therefrom that there was none on that point. *Williams* v. *Whiting*, 92 N. C., 683; *Merrell* v. *Whitmire*, 110 N. C., 367; *Falkner* v. *Thompson*, 112 N. C., 455; *James* v. *R. R.*, at this term. He did not do that, but the solicitor in accepting the appellant's case on appeal generously came to his aid by adding that he did so on the condition that the "Judge's notes of the testimony with instructions asked and refused, are made a part of the case on appeal." The Clerk sends up the original of the Judge's notes of the testimony on file in his office and certifies that he does so, in lieu of sending a transcript thereof, because he "is not able to read the same." Upon inspecting them, he is held excusable. Deciphering them the best we are able, we can find no sufficient evidence therein to justify the refusal to charge as prayed. It may be, and is probable, that the evidence was much fuller and that the Judge's notes are rather memoranda than a transcript of the evidence. But the Solicitor has had them put into the case on appeal as a true statement of what the evidence was and the appellate Court is bound by them. Such method of making up a case on appeal cannot be commended and if followed would cause frequent miscarriages of justice. The Solicitor should have stated the evidence in his counter case (if he did not accept appellants' case) and if the appellants did not accept the counter-case they could have sent it to the Judge to settle. *State* v. *Baker*, 119 N. C., 912.

From the importance of the subject we have discussed the points presented but on the last ground we must send the case back for a new trial.

New trial.

STATE v. RILEY PATE.

Indictment for Murder—Indictment; Sufficiency of—Time of Homicide—Variance.

1. An indictment for murder which sets out the name and county of residence of the accused, the date of the homicide, the averment "with force and arms," the county in which the homicide was committed and that the defendant feloniously, wilfully and of his malice aforethought did kill and murder the person alleged to have been killed "against the form of the Statute in such case made and provided and against the peace and dignity of the State," is sufficient under Chapter 58, Acts of 1887, and is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing.
2. Where an indictment for murder charged the killing to have taken place December 5, 1896, and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found; *Held*, that the variance was not fatal.

INDICTMENT for murder, tried before *Greene, J.*, and a jury at Fall Term, 1897, of MITCHELL Superior Court.

The indictment was as follows: "The jurors for the State upon their oaths present that Riley Pate, late of the county of Yancey, on the 5th day of December, 1896, with force and arms, at and in the county aforesaid, unlawfully, wilfully, feloniously, and of his malice aforethought, did kill and murder one Mat Hensley, against the form of the Statute in such case made and provided, and against the peace and dignity of the State." After arraignment, prisoner's counsel moved to quash (1) because there is no charge in the indictment that prisoner killed a reasonable creature in being: (2) that prisoner is not informed as to the manner of the death,—whether by poisoning, stabbing or shooting; (3) he is not informed whether he is charged with killing a man or a woman. Motion refused, and prisoner excepted.

The first witness testified that deceased was shot December 5, 1896, but did not die until December 10, 1896. The bill charged the killing to have taken place December 5, 1896, and prisoner moved the Court to discharge him as to this bill of indictment: (1) That an acquittal of this bill would not protect him from an indictment which could be preferred, alleging the killing to have taken place on or after the death of the deceased; (2) that the proof shows that deceased was alive and in being after the alleged death, December 5, 1896. Motion overruled, and defendant excepted.

Bascom Roberson testified: On December 5, 1896, he and James Riddle and the prisoner left Higgins' about 12 o'clock, to go to McNeill's store. Witness had a bottle of whisky. Prisoner had three or four bottles and a pistol. They had not gone far, when they saw deceased coming, and prisoner asked who it was. Deceased was a boy, about 15 years old, and lived four or five miles away. When he came up, they treated him and went on up the river, Riddle and prisoner walking in front, and witness and deceased behind. They had not gone far, when deceased told witness that he was going to the marriage of his brother, and wanted witness and Riddle to go with him. Witness told him to tell Riddle, and deceased took him to one side, and had a talk with him. Deceased said he did not want prisoner to go; that prisoner was under the influence of liquor. Shortly afterwards prisoner pulled out his pistol, and fired, and they tried to get him to shoot out all the loads, fearing he might shoot them by accident: prisoner stated he had but two more loads, and that he was going to kill a man, and he pulled out his pistol, and in flourishing it around broke one of the bottles he had in his own coat pocket. This made him mad, and he swore we were the cause of it. He presented his pistol at Riddle. Witness knocked the pistol out of his hand, and broke a piece off the handle. They had not gone far before prisoner presented his pistol at Riddle and the deceased, and told them if they did not stop and drink with him he would kill them. They stopped and drank. Prisoner swore he was going to kill deceased, and presented his pistol at him. Deceased got behind Riddle. Prisoner ran after him, with pistol in hand, and deceased got behind witness, when witness told prisoner he could not hurt deceased, and to stop. He put up his pistol, and asked deceased if he was armed, and deceased said he was not. Prisoner then took hold of him, and searched him, and took his knife, and also the witness' knife, which the deceased had borrowed, and said he was going to throw them into the river, but witness prevented this. They all started on again, arranged as before, and had not gone far when prisoner pulled his pistol out, and called to them to stop, or he would shoot them; and they stopped. On starting again, witness and deceased got in front and ran down to the canoe landing on the river (which was about fifty feet wide), and hid under the bank, got in the canoe, and crossed the river, before prisoner discovered that they had crossed; they were trying to get away from him to go with the deceased to the marriage, and when prisoner saw them he drew his pistol, and ordered them to bring the boat back, and swore that if they did not he would go over there and shoot them. Witness told deceased to run. Deceased replied that he had been trying to get away from the prisoner for some time, and he would not run any further. Prisoner waited a little with pistol in hand, swearing he would kill deceased, and deceased picked up a rock. Prisoner came out of the water, ran deceased round a tree, behind which he was hiding, some two or three times, during which time deceased was begging him not to shoot, and prisoner snapped his pistol at him, after which deceased threw a rock at prisoner, but missed him, and immediately after the rock was thrown, the prisoner shot the deceased, the ball passing through his lungs and liver. When the pistol was fired, some one said to Pate, (the prisoner), from across the river, not to shoot that boy any more, and prisoner pointed his pistol at the party across the river, and swore if he came over he would shoot him. Deceased told prisoner he had killed him, and prisoner lifted deceased's coat and looked at the wound, and said, "If I have, God have mercy on you," and ran off, and was not seen any more until he was arrested. The evidence of Thomas Edwards and James Angel is about the same as that of the preceding witness in all material respects.

Dr. Whittington, a physician, testified that he attended the deceased, and made a *post mortem* examination, and that the ball passed through the lungs and liver, and lodged in the backbone which caused his death.

The father of the deceased testified that deceased was 15 years old, and weighed 100 pounds. The mother of the prisoner testified in his behalf that he was born on May 2, 1881, and had spasms when an infant, and continued to have them until he was a good-sized boy, and then he got better; but since he had got to drinking they had come back on him. On the night of the killing he came home about dark and was drinking, and his face was bloody, and he said the deceased had killed him. He did not appear to know much. A sister of prisoner testified that shortly after the killing she went down to the river to meet her husband, and saw four boys coming up the river. She hid under the bank near the water, and saw Bascom Roberson and deceased take a canoe, and cross the river, and prisoner and deceased got into a quarrel. Prisoner crossed the river, but before he got out of the water the deceased threw one rock at him, and missed him; and when he got to the bank another rock was thrown, which hit the prisoner on the side of the head; and a third rock was thrown, which struck the fence. Deceased and prisoner ran around a tree,—acted as if they were trying to get rid of each other. Prisoner shoved his pistol down, and shot, and walked off a little way with Roberson, and turned, and walked back to the deceased, pulled up his coat, and looked at him, and then started off. Prisoner would take spells when he was a baby, and did not have any sense. Witness did not let herself be known at the river. A brother-in-law of prisoner testified that he saw prisoner after dark that night, and his head was cut; that he had seen him when he did not seem right; that he took him to Madison county the night after the killing. Witness admitted on cross-examination that he betrayed him to J. Hensley, the father of the deceased, for $10. The evidence of Jesse Harden was, in substance, the same as that of the other witnesses in reference to the crossing of the river, running around the tree, etc. The evidence of six other witnesses was to the effect that they knew the prisoner, and had never known or heard of his having spasms before, and that he was about 18 years old.

Prisoner asked the Court to charge: (1) If, previous to the time the quarrel arose across the river, the deceased and prisoner were friends, and at that time there was no preconceived malice on the part of the prisoner, and that the fight occurred on account of the language and the quarrel that arose at that time, the deceased being armed with a rock, and the prisoner with a pistol, the prisoner would be guilty of manslaughter. (2) That, if prisoner went across the river for the purpose of recovering his money, or he believed that Roberson and the deceased were in possession of his money, and were trying to escape with it, he had a right to cross the river with his pistol in his hand, and, if assaulted with a rock by deceased, and he fired his pistol to save himself from death or great bodily harm, he is not guilty. (3) If deceased and prisoner met at the canoe landing, and upon a sudden quarrel a fight ensued, and the prisoner killed the deceased, even if there had been previous malice, the law will not refer to the malice, but to the provocation, and extenuate the offense to manslaughter. * * * (5) If previous quarrels and difficulties between them had been reconciled, and the fight occurred upon a fresh quarrel, it will not be presumed that prisoner was moved by the old grudge, unless it appears from all the circumstances. (6) If prisoner entered into the fight with a deadly weapon, and in the progress of the fight the prisoner was pressed to the wall,—that is, if he was placed in such a position that he had to take the life of his adversary, or receive great bodily harm, or be killed,—and he took the life of his adversary, he would not be guilty. Prisoner excepted to the refusal to give the above instructions as prayed for, though they were, in substance, embraced in his Honor's charge to the jury.

There was a verdict of murder in the first degree. A motion for new trial was made and refused, and from judgment of death the defendant appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
No counsel, *contra.*

MONTGOMERY, J.: The defendant was not represented in this Court by counsel and on that account we have given the whole record a most thorough and painstaking examination. The indictment contains every averment under the requirements of Chapter 58 of the Acts of 1887 to make it a complete bill of indictment for murder. Indeed, less might have been charged in the indictment and yet the same held good and sufficient under the decision of this Court in *State* v. *Arnold*, 107 N. C., 861. In the body of the indictment the name of the person accused, the defendant, is set out, as was the County of his residence, the date of the homicide, the averment "with force and arms," the

County in which the offence was alleged to have been committed and that the accused person feloniously, wilfully, and of his malice aforethought did kill and murder the person alleged to have been killed, against the form of the Statute in such case made and provided and against the peace and dignity of the State." The Court was, therefore, right in its refusal to quash the bill on the motion of the defendant.

After a portion of the testimony had been received to the effect that the deceased was shot and wounded by the defendant on the 5th of December, 1896, and that he died a few days thereafter—70 hours according to the testimony of the attending physician,—the counsel of the defendant "moved the Court to discharge him as to this bill of indictment." We will treat this motion as one made for a new trial because of variance between allegation and proof. The ground of the motion was that it was shown by the evidence that the deceased lived some days after he had been wounded, while the bill of indictment alleged that he was killed outright on the 5th of December and that, therefore, the defendant might be indicted again for the same offence if he should be acquitted on the present trial. The answer to that is that the day on which the indictment alleged the homicide to have been committed is immaterial as to the point raised by the defendant. The State had the right to prove and it was its duty to prove the homicide, if such could have been done, on any day up to the finding of the bill; and all the evidence in the case bearing on the time of the wounding and the time of the death was that he died before the finding of the bill, and within less than a year and a day, *to-wit*, within three days from the day on which the wound was inflicted. It was held in *State* v. *Orrell*, 12 N. C., 139 (before our *Code*, Section 1189; Section 20, Chapter

35, Rev. *Code*) upon motion in arrest of judgment, that the failure in the indictment to allege that the death of the deceased occurred within a year and a day after the wound was inflicted was fatally defective. In that case the indictment charged that the mortal wound was given on a particular day, but failed to state when the death occurred. The reasoning of the Court was that they could not conclude that the actual date of the mortal wound was the day alleged in the bill, as the State could show that it was inflicted on any day before the bill was found. It might have been proved to have been given on any day previous to the finding of the bill, for such proof would have supported the charge that it was given on the day mentioned in the indictment. The Court therefore could not derive any aid from the time charged in the indictment as to when the wound was given, and, by a comparison of that time with the time of the finding of the bill, conclude that death followed within a year and a day from the date of the wound.

But even before the Statute of 1887, Chapter 58, we think the indictment in the case before the Court would have been good so far as the objections raised by the defendant are concerned. In the case of *State* v. *Baker*, 46 N. C., 267, the indictment charged that the blow was inflicted on a certain mentioned day and that the deceased *instantly* died; whereas the fact was established by the evidence that the deceased did not die on the day the wound was inflicted but lived nearly three weeks thereafter. The Court held that the variance was not material because the evidence showed that death occurred within the year and day from the infliction of the wound. The motion to discharge the defendant, treated as a motion for a new trial for variance between allegation and proof, was properly refused by the Court. Such of the special instructions prayed for by the defendant as should have been given to the jury were, in substance, embraced in his Honor's charge; and the Court instructed the jury fully and carefully as to the law bearing upon murder in the first and second degrees under our Statute and also as to that concerning manslaughter, applied those principles to the facts developed in the trial, and gave the whole matter a fair and careful investigation.

The Judge who drafts this opinion of the Court fresh from the perusal of the record in the case, is saddened to have to write that the judgment of the Court below must be affirmed. The youth who was murdered was only fifteen years old and his slayer only about eighteen, addicted to the drink habit and drinking at the time he committed the murder. The boy criminal is by judgment of human law condemned to give his life as the penalty of his crime, but the Great Spirit alone can know how much of that sin is chargeable to him and how much to those who have influenced his life and how much to those who, wherever they live, might have used agencies to make that life one of a higher order. We find no error in the rulings of the Court below and the judgment must be affirmed.

Affirmed.

STATE v. ANDY COLLINS.

Indictment for Larceny—Trial—Evidence—Declarations of Co-Defendant.

Declarations of one of two defendants jointly on trial for larceny are admissible only as against the party making them and, if admitted, it is error not to instruct the jury that such declarations are incompetent as to the other defendant.

INDICTMENT against Andy Collins and Charles Collins for larceny, tried before *Norwood, J.*, and a jury at Fall Term, 1897, of MACON Superior Court. The defendants were convicted and Andy Collins appealed, assigning as error the admission of declarations of his co-defendant as to the part appellant took in the robbery of the store of the prosecutor, Hale.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. J. F. Ray, for defendant (appellant).

FAIRCLOTH, C. J.: Defendants Andy Collins, Charlie Collins and others, were indicted for larceny.

Burgess, a witness for the State, testified that defendant, Charlie Collins, told him that defendant, Andy, "got these goods for him out of Hall's store" and described the manner in which they entered the store, &c. The defendant, Andy, the only appellant, objected to these declarations of Charlie. The objection was overruled and the evidence admitted, and Andy excepted. This was error and is the only exception necessary to consider. Those declarations were competent against Charlie, and if his Honor had instructed the jury that they were competent only against Charlie, and not against Andy, that would not have been erroneous, but no such instruction was given, appearing in the record. Declarations by one defendant, being competent only against him, may tend to show his co-defendant's guilt, but that does not make them incompetent as to the party making them. *State* v. *Brite*, 73 N. C., 26.

New trial.

STATE v. SMARR.

Indictment for Burglary—Juror, Qualification of—Suit Pending and at Issue—Special Venire—Revision of Jury—Change of Venue—Affidavit to Remove—Discretion of Trial Judge—Burglary—Trial—Evidence, Competency of.

1. A juror who has a suit "pending" but not "at issue" at the term of the Court at which he has been drawn to serve, is not disqualified under Section 1728 of *The Code*
2. The requirements of the Statute as to the manner or time of drawing jurors is directory merely and, hence, an objection that the jury list was not revised when required by Statute will not be considered in the absence of proof of bad faith or corruption on the part of the officers charged with that duty or where it does not appear that the party objecting has been, in some way, prejudiced thereby.
3. Sections 196 and 197 of *The Code* forbid a removal of a cause from the County of the right *venue* to another unless the trial Judge shall be "satisfied" that justice demands it; and the granting or refusal of such motion, however strong the affidavits in support of or against the motion may be, and whether there be counter affidavits or not, is not reviewable.
4. In the trial of a person for burglary, it is not competent for him to show that other burglaries were committed in the same neighborhood about the same time as the one with which he is charged was committed.
5. An objection by a prisoner charged with a capital offence that the special *venire* was summoned by the Sheriff as prescribed by Section 1738 of *The Code* instead of being drawn from the jury box as prescribed by Section 1739 of *The Code*, is untenable since the latter method is purely discretionary.

INDICTMENT for burglary, tried before *Hoke, J.*, and a jury at Fall Term, 1897, of CLEVELAND Superior Court. The defendant was convicted of burglary in the first degree, was sentenced to be hanged, and appealed, assigning as error the matters set out in the opinion.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. E. Y. Webb, for defendant (appellant).

CLARK, J.: The motion to quash because one of the grand jurors had a suit "pending" in said Court was properly disallowed. The disqualification applies only to a juror who has a "suit pending *and at issue*" when the juror is drawn. *Code*, Section 1728. The object is to disqualify one who has a suit which is triable at the term for which he is drawn to serve as a juror. If the action should come to an issue at such term, it would not stand for trial "till the term of the Court next ensuing such joinder of issue." *Code*, Section 400. But here the juror's suit was not at issue when drawn, nor did it even come to issue at the term at which he served, for he did not file his answer at that term but was granted sixty days leave to file it. *Hodges* v. *Lassiter*, 96 N. C., 351.

Nor was there any force in the objection that the jury list was not revised (owing to delay in receiving the laws of 1897) on the first Monday in June, but at the meeting of the Commissioners on the first Monday in July or August. It does not appear that the prisoner was in any wise prejudiced thereby, and such requirements as to the manner or time of drawing jurors have always been held directory in the absence of proof of bad faith or corruption on the part of the officers charged with that duty. *State* v. *Stanton*, 118 N. C., 1182; *State* v. *Fertilizer Co.*, 111 N. C., 658; *State* v. *Wilcox*, 104 N. C., 847; *State* v. *Hensley*, 94 N. C., 1021; *State* v. *Griffice*, 74 N. C., 316; *State* v. *Haywood*, 73 N. C., 437.

The prisoner filed an affidavit for removal. The Court refused to remove and the prisoner excepted. The Superior Court of the County in which the offence was committed had the sole jurisdiction to try the offence unless the cause is removed therefrom, and the authority to order such removal is granted and restricted by *The Code*, Sections 196, 197. Section 196 provides that, in all civil and criminal actions upon affidavits on behalf of either party that justice cannot be obtained in the County in which the action is pending, "the Judge shall be authorized to order a copy of the record of said action to be removed to some adjacent County for trial, if *he* shall be satisfied that a fair trial cannot be had in said County." Section 197 says that it shall be competent for the other side to offer counter affidavits and "the Judge shall not order the removal of any such action *unless he shall be satisfied*, after thorough examination of the evidence as aforesaid, that the ends of justice demand it." It does not appear whether the State offered any counter affidavits. The Solicitor may not have deemed it necessary. In a matter of this kind the prisoner naturally states his ground for removal in as strong a light as possible, but the Judge is not bound by the recitals in his affidavits, though no counter affidavit is filed, but is to make "thorough examination of evidence." We do not know whether he heard oral testimony or what knowledge he had that prevented him from believing the averment that a fair trial could not be had in that County. He knew the truth as to the surroundings and circumstances far better than it can be known by us from an *ex parte* affidavit, and the Statute forbade him to remove unless "*he* was satisfied that the ends of justice required it." As he was not, there is no authority given to the appellate Court to hold that he was. It has always been held that the granting or refusing to grant an order of removal is a discretion which the law making power has vested in the trial Judge and that his action is not reviewable. *State* v. *Hall*, 73 N. C., 134; *State* v. *Hill*, 72 N. C., 345; *State* v. *Hildreth*, 31 N. C., 429; *State* v. *Duncan*, 28 N. C., 98. These were the uniform decisions even under the former Statute which was "that the Judge may decide upon such facts whether the belief is well grounded." Since then the present Statute, *Code*, Sections 196, 197 (Acts 1879, Chapter 45) has made the discretion reposed in the trial Judge still more explicit by forbidding him to remove "unless *he* shall be satisfied" that the ends of justice demand it. Under the former less explicit Statute it was said, *obiter*, in *State* v. *Hall*, *supra*, that if the presiding Judge should refuse on account of a supposed want of power it might be reviewable, and possibly there might be other instances. The present Statute is so clear that no Judge could doubt his power, and it would be hard to imagine a case in which the Judge could be reviewed for refusal to remove under a Statute which only confers authority to remove if he is satisfied that the ends of justice require the removal and further forbids him to remove unless he is so satisfied. As Ruffin, C. J., says in *State* v. *Hildreth*, *supra*, "the presiding Judge must dispose of such applications (for removals and continuances) in his discretion and, as in other cases of discretion, his decision cannot be reviewed here but is final." And Bynum, J., in *State* v. *Hill*, *supra*, says, "it will be observed that the Statute does not impose a duty but confers a discretion, and, therefore, it is always competent for the Court to refuse to remove." Since then, as already pointed out, the Statute has restricted the discretion by forbidding removals unless the trial Judge is satisfied he ought to remove. "The temptation to perjury in such cases is so great," as Ruffin, C. J., says, *supra*, that the Legislature has thought proper to thus further discourage such motions. In England, to this day, no appeal has ever been allowed in criminal cases. With us, refusals to set aside a verdict as against the weight of evidence, or to continue or remove a cause, and many other matters, have never been reviewable. It was in the power of the Legislature to commit this matter of passing upon affidavits to remove absolutely to the wisdom and integrity of the trial Judge as best fitted to ascertain the truth of the matters alleged, and it has clearly done so. This is not the case of a motion to remove for wrong *venue* which is a matter of law and reviewable. *Wood* v. *Morgan*, 118 N. C., 749. Here, the *venue* is right and the application is to change therefrom to another County. It is true the affidavit makes some strong averments, as might be expected, but they did not satisfy the learned and just Judge who presided at the trial, and unless they did he was forbidden to remove the cause. It does not appear that counter affidavits were not filed, but if they were not the Court is presumed to have "thoroughly examined" into the facts as required by Statute. The allegation that newspapers had discussed and denounced burglaries, and that one newspaper had published that the prisoner was charged with this offence, was not a very serious matter. The cause could not be moved into a County in which the same or similar newspapers had not largely circulated, nor where indignation would not be felt against the perpetration of an aggravated burglary. The impression once entertained of the dangerous effect upon a juror's mind of having read newspaper versions of an offence and comments thereon has long since worn out and the most intelligent men in a community, the newspaper readers, have long ceased to be held disqualified, on that account, as jurors. There is no reason to believe that the editors of the very papers which denounced the brute who broke into a lady's bed room at night with an axe to slay her, if detected, and who actually choked her, might not have been safely trusted to decide whether the evidence proved beyond a reasonable doubt that the prisoner's was the hand which did it. In the County of Cleveland, with some 4,000 voters, his Honor doubtless conceived that it would not be difficult to find twelve honest and unbiased men who would give the prisoner as fair a trial as could be had in any adjoining county. It does not even appear that he exhausted his peremptory challenges. With unlimited challenges for cause, and twenty three challenges without cause, the prisoner doubtless had a fair jury and he assigns no error in the Judge, either as to the exclusion of evidence or in the instructions other than the utterly untenable exception that the Court would not admit evidence that other houses had been burglarized about the same time. It would not have been competent, even, to have shown that another had been convicted of the very offence with which the prisoner was charged. *State* v. *Beverly*, 88 N. C., 632.

The other exception that the special *venire* was summoned by the Sheriff as prescribed by *The Code*, Section 1738, and not drawn out of the box, is equally untenable. The Statute (*Code*, Section 1739), makes the latter mode purely discretionary. *State* v. *Stanton*, *supra; State* v. *Brogden*, 111 N. C., 656.

No error.

STATE v. C. A. TRAYLOR.

Indictment for Forgery—Evidence of Character of Defendant.

Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad; *Held*, that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence.

INDICTMENT for forgery of a promissory note, tried before *Hoke, J.*, and a jury at Fall Term, 1897, of UNION Superior Court. The defendant was convicted and appealed, assigning as error the refusal of his prayer for instruction that evidence as to his character could not be allowed to affect the question of his guilt or innocence but only his credibility as a witness, he having testified in his own behalf.

Mr. Zeb V. Walser, Attorney General, for the State.

Messrs. Jones & Tillett and *Osborne, Maxwell & Keerans,* for defendant (appellant).

MONTGOMERY, J.: The defendant, McGee, who had entered a plea of guilty to the indictment charging him and the other defendant, Traylor, with the forgery of a promissory note, on his examination as a witness for the State, testified that he and Traylor committed the forgery and that they also, at and about the same time, obtained money from various persons by means of false pretences. There was other evidence tending to show that at the time the note was forged, and before, the defendants were engaged "in an illegal combination to cheat parties by sale of a patent right and by taking notes absolute in form but to which there was attached a collateral condition, and putting the notes into the hands of innocent purchasers before due." Traylor was introduced as a witness in his own behalf and testified that he knew nothing of any design on McGee's part to cheat any one, and thought McGee had a right to sell the patent; that he knew nothing about the forgery at the time it was committed, nor had he ever heard of it until he was arrested upon the charge of having committed it. He introduced no evidence as to his character. The State, however, in reply introduced evidence going to show that the general character of the defendant, Traylor, was bad. The counsel of defendant requested his Honor to charge the jury that the evidence as to the defendant's character should only affect his credibility as a witness, and should not be considered in any other light. The Court refused to give the instruction but, instead, charged the jury that the evidence of the defendant's bad character offered by the State could properly be considered by them as a circumstance in determining the question of the guilt or innocence of the defendant Traylor upon the charge set forth in the bill of indictment. The Act of 1881, Chapter 110 (*Code*, Section 1353) gave to defendants the right and privilege in all criminal indictments, complaints and other proceedings, at their own request but not otherwise, to be competent witnesses. Before the passage of that Act, the State could not impeach the character of a defendant unless the defendant himself opened the way by offering through the testimony of witnesses evidence of his general character. Has the rule been altered since the Act of 1881? If a defendant introduces himself as a witness he can be impeached as any other witness can be, no doubt. But can the evidence of his general bad character be allowed to affect him as a defendant? Can it affect him except as to his credibility as a witness?

The first case in which the Statute of 1881, was discussed is that of *State* v. *Efler*, 85 N. C., 585. There, the defendant was examined in his own behalf and the State, for the purpose of discrediting him as a witness and for no other purpose, offered testimony of his general bad character and it was admitted by the Court below for that purpose alone. The Court said: "In declaring him to be 'a competent witness' we understand the Statute to mean that he shall occupy the same position with any other witness, be under obligation to tell the truth, entitled to the same privileges, receive the same protection, and equally liable to be impeached or discredited. . . . . But by availing himself of the Statute he assumes the position of a witness and subjects himself to all the disadvantages of that position, and his credibility is to be weighed and tested as that of any other witness."

In *State* v. *Thomas*, 98 N. C., 559, Chief Justice Smith, in delivering the opinion of the Court, after reciting the law as declared in *State* v. *Efler*, *supra*, and commenting upon the position which a defendant occupies who takes the stand as a witness for himself, said: "This results from the necessity of ascertaining the value and weight to be given to his testimony by the jury; and it is certainly a material inquiry whether the witness is entitled to credit and deserving their confidence in the truthfulness of his statements."

The decisions in these cases are not an express adjudication upon the question raised in this case, but we think they impliedly decide the question. We are of opinion that his Honor ought to have given the charge as requested and that there was error in his refusal to do so.

New trial.

STATE v. J. P. MONROE.

Assault and Battery—Druggist—Croton Oil—Improper Administration of Drugs.

1. Where a druggist, at the request of a customer, dropped croton oil on a piece of candy which the purchaser gave to another person, and the latter ate the candy so drugged, to his serious inconvenience and injury, and the druggist knew, or had reason to believe that the dose was intended for such person, or some one else, as a trick and not for medicinal purposes; *Held*, that the druggist was guilty of assault and battery.
2. In such case, it was not necessary, to constitute the offence, that the dose should be a poisonous or deadly one, but only that it should be an unusual dose likely to produce serious results.

INDICTMENT for assault and battery, tried at August Term, 1897, of UNION Superior Court, before *Hoke, J.*, and a jury. The defendant was convicted and appealed. The facts sufficiently appear in the opinion.

Mr. Zeb V. Walser, Attorney General, and *Messrs. Adams & Jerome* for the State.

Messrs. E. Y. Webb and *Covington & Redwine* for defendant (appellant.)

FAIRCLOTH, C. J.: Will Horn administered to Ernest Barrett, a dose of croton oil and the oil had an injurious effect on Barrett. Defendant admits he sold the oil to Horn and at his request dropped it into a piece of candy, but says he did not know that these parties were playing practical jokes on each other and did not know for what purpose Horn wanted the oil. Another witness testified that defendant said that Horn said he wanted the oil "for a fellow." Defendant denied saying this. Another witness testified to the quinine episode and to Barrett's and Horn's tricks with each other. Defendant testified that he knew that, a day or two before, Horn had given Barrett a dose of quinine as a joke, in lemonade. There were other witnesses on these matters.

Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, not as an accessory. His guilt, then, depends upon whether he knew or had reason to believe that the dose was intended for Barrett or some other person, as a trick, and not for medicinal purposes.

The whole evidence was submitted to the jury who rendered a verdict of guilty. His Honor instructed the jury that when the defendant sold the oil, if he "knew or had reason to believe, and did believe, that it was intended for Barrett or some other person by way of a trick or joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery."

He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection, and we think it covers the substance of the defendant's prayers proper to go to the jury. There was no exception to the evidence. For duties of druggists, see *Code*, Section 3143–5.

Affirmed.

STATE v. W. R. EDMONDS.

Indictment for Removing Division Fence—State Law.

Since Chapter 219, Acts of 1885, makes it unlawful for any live stock to run at large in Buncombe county, and provides for a stock law requiring the erection of an outside fence around the county by the Board of Commissioners, it is no offence for a land owner of that county to remove his part of a division fence between his lands and his neighbor's, without regard to his intention to cultivate or make a pasture of his own land.

INDICTMENT under Section 2802 of *The Code*, for removing a division fence without notice, &c., tried before *Ewart, J.*, and a jury at January Term, 1897, of the Criminal Court of BUNCOMBE county. The defendant was convicted and appealed.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. Alfred S. Barnard, for defendant (appellant).

FAIRCLOTH, C. J.: This indictment is for removing a division fence between the defendant and the prosecuting witness, which had existed for several years, and was alleged to have been removed without notice to the owner of the other half of the fence, contrary to the provisions of *The Code*, Section 2802. The case was tried, exceptions to the charge made, and the jury rendered a verdict of guilty. We take a view of this case which relieves us from considering any of the exceptions, motions or alleged defects in the bill of indictment. The Act of 1885, Chapter 219, declares it to be unlawful for any live stock to run at large in Buncombe county and forbids any person to permit any of his live stock to enter upon the lands of another without leave from the owner. The Act fully provides the machinery for establishing in said county what is known as a "stock law" requiring an outside fence to be erected around the county by the Board of County Commissioners. Under this Act defendant certainly could dispense with his outside fence, and we see no advantage to either party to keep up a division fence as required by Chapter 20 of *The Code.* This being so, the defendant committed no offence in pulling down and removing his part of the fence, without any regard to his intention to cultivate or pasture his own land. This action must be dismissed. Judgment reversed.

Reversed.

STATE v. JOHN GIBSON.

Indictment for Giving Away Intoxicating Liquor on Election Day—Evidence, Sufficiency of—Intent.

1. Where, in the trial of an indictment for giving away intoxicating liquor on an election day, there was direct evidence that the defendant gave whiskey to one R. within the time and at the place as charged, it was not error to refuse an instruction that there was not sufficient evidence to convict
2. Where, in the trial of an indictment under Section 2740 of *The Code,* for giving away intoxicating liquor on an election day, it appeared that defendant casually found a bottle of whiskey and passed it to another who drank of it; *Held,* that such act was a violation of the Statute.
3. It is not necessary, to constitute a violation of Section 2740 of *The Code,* that the selling or giving away liquor on election day shall be with the intent to influence any voter or with any intent.

INDICTMENT under Section 2740 of *The Code,* tried before *Ewart, J.,* at July Term, 1897, of the Criminal Circuit Court of BUNCOMBE county.

Mr. Zeb V. Walser, Attorney General, for the State.
No counsel, *contra.*

CLARK, J.: The defendant is indicted under *The Code,* Section 2740, for giving away intoxicating liquor within five miles of a polling place at a time within twelve hours next preceding and succeeding a municipal election. The indictment is in due form and avoids the objections which were sustained in *State* v. *Stamey*, 71 N. C., 202. There was direct evidence that the defendant gave some whiskey to one Roney, and within the time and place as charged. The Court therefore properly refused the prayer to instruct the jury that the evidence was not sufficient to convict. The defendant testified that he found the bottle of whiskey; that he had not put it there, nor knew who did, but drank some of it; that he refused to give any of it to Roney, but told him he could get it the same way he did. The Court charged the jury that "if they believed defendant's statement he would not be guilty. But that if they found as a fact from the evidence that Gibson put the liquor there, or knew of its being there, and gave any of the liquor to the witness, Roney, he would be guilty; or, if they found as a fact that Gibson found the liquor there, and if he passed the bottle containing liquor to the witness Roney, and Roney drank it, he would be guilty." To this, the defendant excepted, but we find no error that he can complain of. *State* v. *McMinn*, 83 N. C., 668. It is immaterial how the defendant acquired possession of the liquor, whether by previous arrangement or by chance finding it. The material point is whether he gave it away to Roney within the time and limits specified in the indictment, and that was properly left to the jury. The Statute does not require that the selling or giving away liquor shall be with intent to influence any voter, or with any intent.

No error.

STATE v. JAMES RABY.

Indictment for Fornication and Adultery—Evidence, Competency of—Witnesses—Divorced Husband.

1. In the trial of an indictment for fornication and adultery evidence of facts transpiring after the finding of the bill of indictment and tending to show the guilt of the defendants, is admissible.
2. Where, in the trial of an indictment for fornication and adultery, a witness testified that defendants lived together about three months before they were married and had prior to that time, moved to a distant place and had returned; *Held*, that the evidence was sufficient to be submitted to the jury as to the guilt of the defendants.
3. In the trial of an indictment for fornication and adultery testimony that the defendants were seen working together in a field, although slight evidence of their guilt, was competent as tending to show, with other circumstantial evidence, that the defendants were living together in fornication and adultery.
4. Under Section 588, of *The Code*, a divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce.

INDICTMENT for fornication and adultery, tried before *Norwood, J.*, and a jury at Fall Term, 1897, of MACON Superior Court. The defendants were convicted and appealed, assigning as error the grounds referred to in the opinion of the Court.

Mr. Zeb V. Walser, Attorney General, for the State.
Mr. J. F. Ray, for defendant (appellant).

FURCHES, J.: The defendants, James Raby and Ruena Shields, were indicted for the crime of fornication and adultery. The defendant, Ruena, had been married to one Mark Shields, but they were divorced at Spring Term, 1896, of Macon Superior Court. The defendants were found guilty and, after judgment, appealed, assigning three grounds of error as follows:

1. That the Court admitted evidence, tending to show the guilt of defendants, of facts that transpired since the

finding of the bill of indictment. There was no error in allowing this evidence. *State* v. *Stubbs*, 108 N. C., 774; *State* v. *Guest*, 100 N. C., 410; *State* v. *Wheeler*, 104 N. C., 893.

2. Another exception is that the Court refused a prayer of defendants, requesting the Court to charge that there was no evidence to go to the jury upon which they could find a verdict of guilty. This prayer was properly refused, as there was evidence sufficient to carry the case to the jury.

3. The third is as to the evidence of Mark Shields, the former husband of the defendant Ruena. He testified that about three years ago he "saw the defendants chopping in rye, together, in a field." This is but slight evidence of the guilt of defendants. But the whole case is one of circumstantial evidence, and it cannot be seen but what this circumstance contributed to the finding a verdict of guilty.

It becomes necessary therefore to see whether this evidence was competent or not. It is not claimed that it is competent under Section 589 or 590 of *The Code*.

This Section (588) applies to the competency or incompetency of husband and wife, and it is seen by examination of this Section of *The Code*, that this evidence would have been incompetent, if Mark Shields had continued to be the husband of the defendant Ruena.

This Section of *The Code* has not changed the rule as between husband and wife from what it was before its enactment as to any evidence offered for the purpose of establishing adultery in either party. This rule of evidence is grounded on public policy and not on questions of interest, and, for this reason, Sections 589 and 590 do not apply. As the rule has not been changed by 588 nor by 589 nor by 590 of *The Code*, we only have to look to decided cases to see what construction was placed upon the competency of a divorced party, before these enactments. And we find that a divorced party was incompetent to testify to any act showing or tending to establish adultery of the other party which occurred during the time of their marriage. *State* v, *Jolly*, 20 N. C., 110.

The law thus draws the line of incompetency and covers this period of their lives with the mantle of protection. For the error in admitting this incompetent testimony, which may have influenced the verdict of the jury, there must be a new trial.

New trial.

STATE v. MITCHELL BYRD.

Indictment for Murder—Self-Defence—Evidence—Instructions—Mitigation—Burden of Proof—Violent Character of Deceased—Threats.

1. Where, in the trial of an indictment for murder, there is an entire absence, even of a scintilla, of evidence of self-defence, it is not error to instruct the jury that there was no evidence tending to show that the killing was done in self-defence.
2. Where, in the trial of an indictment for murder, the wilful killing has been admitted or proved beyond a reasonable doubt, the burden rests upon the prisoner of showing such facts as he relies upon in mitigation or excuse, and for such purpose he has the equal benefit of all the evidence in the case whether introduced by himself or by the State; but, though such mitigating facts be shown as will reduce the crime to manslaughter, the burden is still upon him to show such further facts as will excuse the homicide before he can be entitled to an acquittal.
3. In the trial of one charged with murder, facts offered by the accused in mitigation or excuse need not be proved beyond a reasonable doubt but only to the satisfaction of the jury.
4. Where, in the trial of one charged with murder, the wilful killing is admitted or proved and there is no evidence of self-defence, testimony as to the violent and dangerous character of the deceased and of his threats against the accused is not admissible.
5. On the trial of one charged with murder, evidence of threats by the deceased against the accused and of the violent character of the deceased is not admissible to show self-defence unless such character

was known and such threats communicated to the accused, except in cases where the evidence of the killing is entirely circumstantial.

INDICTMENT for murder tried before *Adams, J.*, and a jury at May Term, 1897, of MITCHELL Superior Court. The defendant was convicted of manslaughter and appealed.

Mr. Zeb V. Walser, Attorney General, and *Messrs. S. J. Ervin* and *W. C. Newland* for the State.

Mr. E. J. Justice, for defendant (appellant).

DOUGLAS, J.: This is an indictment for murder resulting in a conviction for manslaughter. There were several exceptions to the exclusion of testimony tending to show the violent and dangerous character of the deceased and threats made by him against the prisoner, which were communicated to the prisoner. The prisoner also excepted to the charge of the Court that there was no testimony tending to show that the killing was done in self-defence. Upon the correctness of this charge depends the validity of the exceptions to the exclusion of evidence. After a careful examination of the testimony, we are unable to find any evidence, even a scintilla, tending to show self-defence. If there were any such evidence, its weight would be for the jury and not for the Court to determine; but, in its entire absence, it was proper for the Court to instruct the jury that there was no such evidence.

The killing of the deceased by the prisoner with a pistol, which is *per se* a deadly weapon, was directly proved by two witnesses and admitted by the prisoner. Such being the case, the burden rested upon the prisoner of showing such facts as he relied on in mitigation or excuse, and for this purpose he would have equal benefit of all the evidence in the case, whether introduced by himself or by the State. In the absence of any such evidence he would be deemed guilty of murder. Mitigating circumstances might reduce the crime to manslaughter, but even the burden would still remain upon the prisoner of showing such further facts as would excuse the homicide before he would be entitled to an acquittal. *State* v. *Willis*, 63 N. C., 26; *State* v. *Ellick*, 60 N. C., 56; *State* v. *Johnson*, 48 N. C., 266; *State* v. *Haywood*, 61 N. C., 376; *State* v. *Smith*, 77 N. C., 488; *State* v. *Brittain*, 89 N. C., 481; *State* v. *Thomas*, 98 N. C., 599; *State* v. *Rollins*, 113 N. C., 722; *State* v. *Horn*, 116 N. C., 1037. The leading case of *Commonwealth* v. *York*, 9 Metc., 93, has a full discussion on the subject. But in all cases the wilful killing must be proved beyond a reasonable doubt, as up to this point the prisoner is always presumed to be innocent. Facts offered by the prisoner in excuse or mitigation need not be proved beyond a reasonable doubt, but only to the satisfaction of the jury.

As the killing was admitted, and there was no evidence of self-defence, we think the testimony as to the violent and dangerous character of the deceased and his threats against the prisoner, whether communicated or not, was properly excluded. Threats, even when made by a man of known violence of character, do not of themselves excuse or mitigate homicide, nor are they *per se* evidence of self-defence. The burden of the plea *se defendendo* being upon the prisoner, where there is no evidence the Court can so instruct the jury. Where there is evidence tending to show self-defence, such threats are admissible as tending to show the reasonable apprehension of immediately impending danger on the part of the prisoner. Under such circumstances the violent and dangerous character of the deceased can also be shown for the same purpose. One has the right to take the life of another if necessary to protect himself from death or great bodily harm, and the reasonable apprehension, which is a question for the jury when there is any evidence tending to prove it, is the legal test of the necessity. The fact that a weapon apparently deadly was really incapable of harm, such as an unloaded pistol, if unknown to the prisoner, would not make him guilty. Where such reasonable apprehension is found to exist, the prisoner is not required to give his assailant the full opportunity of killing him, as this would destroy the right of self-defence by rendering it either unnecessary or impossible.

In exercising this inalienable right, well called "the first law of nature," the prisoner is necessarily compelled instantly to measure the danger in which he is placed and the degree of force required to repel the impending attack. This he must do from the size and apparent strength of his enemy, whether he is armed and in what manner, his feeling towards the prisoner, and his character as a fighting man. Here, his known character and communicated threats are material. The maudlin imprecations of an idle braggart will not produce the same impression upon a reasonable man as the cool and determined threats of a man known to be of desperate character and habitual violence of action. In *State* v. *Floyd*, 51 N. C., 392, in which such evidence is held admissible, occurs the celebrated expression of Chief Justice Pearson that "One cannot be expected to encounter a lion as he would a lamb." But where there appears no element of self-defence, and consequently no ground for immediate apprehension, these principles have no application. Therefore, testimony as to previous threats or violence of character would be neither material nor admissible.

From the weight of authority we are of the opinion that such evidence is admissible only in cases where there is other evidence tending to show self-defence, or where the evidence of the killing is entirely circumstantial and its attendant circumstances unknown. *State* v. *Tackett*, 8 N. C., 210; *State* v. *Tilly*, 25 N. C., 424; *State* v. *Scott*, 26 N. C., 409; *State* v. *Barfield*, 30 N. C., 344; *Bottoms* v. *Kent*, 48 N. C., 154; *State* v. *Hogue*, 51 N. C., 381; *State* v. *Floyd*, *supra; State* v. *Chavis*, 80 N. C., 353; *State* v. *McNeill*, 92 N. C., 812; *State* v. *Hensley*, 94 N. C., 1021.

The rule as laid down in *Turpin's Case,* 77 N. C., 473, and frequently approved, is this: "Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been done from a principle of self-preservation and, also, where the evidence is wholly circumstantial, and the character of the transaction is in doubt." We think that threats made by the deceased against the prisoner come under the same rule. If the threats are not communicated to the prisoner and the character of the deceased is unknown to him, such evidence is not admissible when offered only to show self-defence because facts of which the prisoner had no knowledge could have no effect upon his mind. *State* v. *Turpin, supra; State* v. *Hensley, supra; State* v. *Rollins, supra.* But, where the evidence is wholly circumstantial, testimony of the violent character and threats of the deceased, even if unknown to the prisoner, are admissible as tending to show the inherent probabilities of the transaction. *State* v. *Tackett, supra; State* v. *Hensley, supra.* In the latter case the syllabus appears to differ from the opinion. While this principle has been doubted in some cases, we think it is correct and its adoption the only way of reconciling apparently conflicting opinions.

The other exceptions were properly abandoned by the counsel, who have done their full duty by the prisoner, as is abundantly shown in the Court below by the verdict of manslaughter. The judgment is affirmed.

Affirmed.

STATE v. FRANK H. SHORT.

(For syllabus see State *v.* Addington, *ante*, page 541.)

CRIMINAL ACTION tried before *Bryan, J.*, and a jury, at Spring Term, 1897, of BEAUFORT Superior Court, on appeal from judgment of a Justice of the Peace. Upon a special verdict, substantially the same as in *State* v. *Addington, ante*, his Honor entered a verdict of not guilty, and the State appealed.

Mr. Zeb V. Walser, Attorney General, for the State, (appellant).

Mr. W. B. Rodman, for defendant.

FAIRCLOTH, C. J.: This case is governed by *State* v. *Addington*, at this Term.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 53. H. C. WHITEHURST *v.* EAST CAROLINA LAND AND RAILWAY COMPANY; from Craven. Appeal by defendant; dismissed by consent of appellant.

No. 138. J. C. MARCOM, Administrator of W. H. Bledsoe, *v.* P. T. WYATT et al; from Wake. Appeal by defendant, M. A. Bledsoe.

Per Curiam: Appeal dismissed under Rule 16.

No. 139. D. W. POPE et al. *v.* H. A. COATS et al; from Harnett. Appeal by defendants.

Per Curiam: New trial.

No. 200. G. DAVISON et al *v.* WEST OXFORD LAND COMPANY; from Granville. Appeal by plaintiff.

Per Curiam: Appeal dismissed under Rule 17.

No. 209. STATE *v.* U. M. COLLINS; from Onslow. Appeal by defendant.

Per Curiam: Appeal dismissed under Rules 16 and 30.

No. 221. L. M. POLLOCK *v.* ENOCH WADSWORTH; from Jones. Appeal by plaintiff.

Per Curiam: Appeal dismissed under Rule 30.

No. 238. W. A. DUNN, Receiver, *v.* D. D. UNDERWOOD et al; from Sampson. Appeal by defendants.

Per Curiam: Dismissed.

No. 239. T. E. STAGG *v.* EINSTEIN BROS., et al; from Lenoir. Appeal by defendants.

Per Curiam: Dismissed under Rule 17.

No. 240. C. C. PARKER et al *v.* SAMUEL ALBERTSON; from Duplin. Appeal by plaintiff.

Per Curiam: Dismissed under Rule 17.

No. 259. E. A. GINGERY *v.* J. C. SMITH; from Robeson. Appeal by Plaintiff.

Per Curiam: Dismissed under Rule 15.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 269. YARBOROUGH BROS. *v.* JOHN A. MILLS & Co., from Moore. Appeal by defendants.

Per Curiam: Affirmed.

No. 280, B. NATIONAL BANK OF CHAMBERSBURG *v.* J. T. SEAWELL; from Moore. Appeal by plaintiff.

Per Curiam: Dismissed under Rule 17.

No. 280, C. T. L. McNAIR *v.* JOHN PURCELL; from Cumberland. Appeal by plaintiff.

Per Curiam: Appeal dismissed under Rule 17.

No. 280, D. J. B. DAVIS *v.* D. E. BEARD; from Cumberland. Appeal by plaintiff.

Per Curiam: Dismissed under Rule 17.

No. 303. JULIUS M. SURRATT *v.* MARY C. BADGETT, Administratrix; from Davidson. Appeal by defendant.

Per Curiam: Judgment below affirmed.

No. 304. JULIUS M. SURRATT *v.* MARY C. BADGETT, Administratrix; from Davidson. Appeal by plaintiff.

Per Curiam: Judgment below affirmed.

No. 330. STATE ex rel. W. B. WRAY, *v.* DAVIS SEWING MACHINE COMPANY; from Rockingham. Appeal by defendant.

Per Curiam: Judgment below reversed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

No. 333. JOSEPH MILLER, *v.* W. B. ELLIS, et al; from Forsythe. Appeal by defendants.

Per Curiam: New trial ordered.

No. 335. M. O. JAMES, et al, *v.* EUGENE S. WITHERS, et al; from Stokes. Appeal by defendants.

Per Curiam: Judgment below affirmed.

No. 338. JOSEPH G. MILLER, *v.* W. B. ELLIS & CO., from Forsythe. Appeal by plaintiff.

Per Curiam: New trial ordered.

No. 355. STATE *v.* MERIT CAIN; from Catawba. Appeal by the State.

Per Curiam: Dismissed on motion of Attorney General.

No. 355 A. STATE *v.* HEZEKIAH DICKSON, et al; from Burke. Appeal by the State.

Per Curiam: Appeal dismissed on motion of Attorney General.

No. 356: STATE *v.* J. R. HAGAMAN; from Caldwell. Appeal by defendant.

Per Curiam: New trial ordered.

No. 358. STATE *v.* LEWIS BUTNER; from Yancey. Appeal by defendant.

Per Curiam: Appeal dismissed under Rules 16 and 30.

No. 373. J. B. GARRISON et al, *v.* ANNA P. BLANKENSHIP, et al. Appeal by defendants.

Per Curiam: Judgment below affirmed.

No. 397. STATE *v.* THOMAS SCRONCE; from Lincoln. Appeal by defendant.

Per Curiam: Judgment below affirmed.

No. 442. STATE *v.* W. B. CASE et al; from Transylvania. Appeal by the State.

Per Curiam: Judgment below affirmed.

No. 449. J. M. MOSS, Receiver, *v.* A. N. LEATHERWOOD, from Clay. Appeal by defendant.

Per Curiam: Appeal dismissed under Rule 15.

No. 450. J. L. DOVER AND WIFE *v.* H. R. RAY; from Madison. Appeal by plaintiff.

Per Curiam: Appeal dismissed under Rule 16.

No. 491. J. A. KLINE, et al, *v.* FRENCH BROAD LUMBER COMPANY; from Swain. Appeal by defendant.

Per Curiam: Appeal dismissed under Rule 17.

No. 492. J. D. TABOR *v.* S. E. CLARK; from Swain. Appeal by plaintiff.

Per Curiam: Appeal dismissed under Rule 17.

APPENDIX.

SUPREME COURT RULES

5, 6, 17, 28, 29, 30, 31, 32 and 37.

As amended and adopted by the Supreme Court, December 24, 1897, and RULE I as amended and adopted February 8th, 1898. (See 119 N. C., 930, et seq.)

1. **When Examined.**—Applicants for license to practice law will be examined on the first Monday of each Term, and at no other time. All examinations will be in writing.

5. **When Heard.**—The transcript of record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order. The transcript of the record on appeal from a Court in a county in which the Court shall be held during the term of this Court may be filed at such term, or at the next succeeding term. If filed before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless, by consent, it is submitted upon printed argument, under Rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause, or by consent, it is continued: *Provided, however*, That a cause from the First, Second and Third Districts, which is tried between January 1st and the first Monday in February, and between September 1st and the last Monday in September, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

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6. Appeals in Criminal Actions.—Appeals in criminal cases, docketed before the call of the docket for its district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the beginning of the call of the docket of the district to which they belong, shall be called immediately at the close of argument of appeals from the Twelfth District, unless, for cause, otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

17. Dismissed by Appellee.—If the appellant in a civil action shall fail to bring up and file a transcript of the record before the Court begins the call of causes of the district from which it comes at the term of this Court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the Clerk of the Court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if it has been settled, and filing said certificate or a certified transcript of the record in this Court, may have the appeal docketed and dismissed at the appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

28. What to be Printed.—Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals. In these latter the Clerk of this Court shall make five typewritten copies of such parts of the record as present the exceptions. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as part of the costs on appeal. The printed transcript shall be in the order required by Rule 19(1) and shall contain the marginal references and index required by Rule 19(2) and 19 (3). Though, for economy, the marginal references in the manuscript may be printed as sub-heads in the body of the record and not on the margin.

29. How Printed.—The transcript on appeal shall be printed under the direction of the Clerk of this Court and in the same type and style, and pages of same size, as the Reports of this Court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up the appeal shall send therewith a deposit in cash, for that purpose, to the Clerk of this Court, of sixty cents (which includes ten cents for the Clerk) for each printed page—400 words in the written transcript being estimated as equal to a printed page of the form and style required by this Rule.

30. If not Printed.—If the transcript on appeal (except in pauper appeals) shall not be printed, as required by the Rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, re-instate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the Rule as to printing is not complied with, other than pauper appeals.

31. Costs of Printing.—The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, fifty cents per page of one copy of the printed transcript, and not exceeding fifty pages of the above specified size and type, unless otherwise specially ordered by the Court; and the Clerk of this Court shall be allowed ten cents additional for each such page for making copy for the printer, unless the appellant shall send up a duplicate manuscript or typewritten copy for that purpose, or shall have the copies printed below. Judges and counsel should not incumber the "case on appeal" with evidence or other matters not pertinent to the exceptions taken. When the case is settled, either by the Judge or the parties, if either party deems that such unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the transcript shall be decided without argument.

32. Printing Briefs.—While briefs are not yet required to be printed, they are desirable in all cases which can be deemed of sufficient importance to be brought to this Court. Such briefs may be printed under supervision of counsel, or of the Clerk of this Court, but must be of the size and style prescribed by Rule 29 for the transcript on appeal. If to be printed here, the deposit therefor must be made as specified in Rule 29.

37. Rule 37 is amended by striking out "sixty" and inserting "fifty."

ANALYTICAL INDEX.

ABANDONMENT, as cause for Divorce, 118.

ABOLITION OF OFFICE.

1. The General Assembly may, at its discretion, abolish municipal as well as other corporations. *Ward* v. *Elizabeth City*, 1.
2. One who accepts an office created by legislative enactment takes it with notice of the power of the Legislature to abolish it and subject to all the provisions of the Act creating the office. *Ibid.*

ACCOMMODATION ENDORSER OF NOTE.

The owner of a note endorsed by the payees for the accommodation of the maker may sue any one of several endorsers without joining the maker or any other endorser. *Bank* v. *Carr*, 113.

ACCORD AND SATISFACTION, 509.

ACTION, Division of :

Where there is not only a misjoinder of distinct causes of action but also a misjoinder of parties having no community of interests, the action cannot be divided under Section 272 of *The Code* which permits division only when the causes alone are distinct *Cromartie* v. *Parker*, 198.

ACTION FOR BREACH OF CONTRACT, 186, 490.

ACTION FOR DAMAGES, 8, 34, 205, 301, 362, 484, 492, 504, 506, 512, 514, 519, 523, 530.

ACTION FOR DIVORCE, 118, 297.

ACTION FOR MONEY PAID FOR USE AND BENEFIT OF ANOTHER, 272.

ACTION FOR MONEY PAID THROUGH MISTAKE, 369.

ACTION FOR PENALTY, 157.

ACTION FOR SPECIFIC PERFORMANCE, 129, 209, 366.

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ACTION FOR TRESPASS, 339.

ACTION ON CONSTABLE'S BOND, 37.

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ACTION TO FORECLOSE MORTGAGE, 51, 214, 258.

ACTION TO RECOVER INSURANCE PREMIUMS PAID, 62.

ACTION TO RECOVER LAND, 31, 38, 154, 237, 248, 318, 322, 357, 410.

1. A defendant in an action to recover land, who sets up title through purchase of the land by his ancestor, is estopped to deny the title of the latter's grantor. *Collins* v. *Swanson*, 67.
2. Where, in an action to recover land, plaintiff and defendant claim title from a common source, the plaintiff is required only to show the better title from such source. *Ibid.*
3. Where, in an action to recover land, the defendant set up as title the alleged purchase of the land, by his ancestor, from the plaintiff's ancestor, J. S., and also pleaded the twenty years statute of limitations and admitted that plaintiffs were the heirs at law of J. S., and that the latter had died within 15 years prior to the commencement of the action, and the plaintiffs introduced testimony tending to show that the defendant had not been in possession of the land for 20 years; *Held*, that the burden of proof having been shifted upon the defendant, by the allegations in his answer and his admissions, to show a better title either by a valid conveyance from the common source to himself or his ancestor, or by making good his plea of the statute, it was error to non-suit the plaintiff. *Ibid.*
4. Where, in an action to recover possession of land, the defendant failed to file answer or the bond required by Section 237 of *The Code* and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under Section

390 of *The Code*, to give judgment against the defendant for possession of the land, without damages. *Jones* v. *Best*, 154.

ACTION TO RECOVER TAXES UNLAWFULLY PAID:

1. The provision in Section 84, Chapter 137, Acts of 1887, requiring demand for the repayment of invalid taxes to be made within thirty days after payment is mandatory. *Hatwood* v. *Fayetteville*, 207.
2. An action begun in July, 1894, for the recovery of invalid taxes paid in 1890 and several years previous, is barred by *The Code*, Section 155. *Ibid.*
3. Where taxes are repaid under a mistake of fact, demand for repayment must be made within thirty days after the mistake is discovered. (Acts 1887, Chapter 137, Section 84.) *Ibid.*

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The use of a street for laying pipes, &c., in furnishing water, lights, &c., does not impose any additional servitude beyond those reasonably included in the dedication of all streets. *Smith* v. *City of Goldsboro*, 350.

ADMINISTRATION.

Where letters of administration are issued to one person, who qualifies, the power of the Clerk, in that respect, and as to that Estate, are exhausted and the subsequent appointment of another person as administrator, before the first appointment is revoked, is void. *In re Bowman's Estate*, 373

ADMINISTRATOR:

An administrator who procured a bidder to buy his intestate's land at a sale made by himself as administrator and, after making a deed to the bidder, took a reconveyance to himself individually, (no money having passed in either transaction) and reported to the Court that the land fetched a certain sum, is chargeable with such sum and interest from the date of the sale although he disclaimed purchasing the land on his own account and, immediately after the conveyance to himself, contracted to sell to other parties at a less price. *McNeill* v. *Fuller*, 209.

ADMINISTRATOR, Appointment of:

Where letters of administration are issued to one person, who qualifies, the power of the Clerk, in that respect, and as to that Estate, are exhausted and the subsequent appointment of another person as administrator, before the first appointment is revoked, is void. *In re Bowman's Estate*, 373.

ADMINISTRATOR, Purchaser of Decedent's Land, 209

ADMINISTRATOR, Right to sell Land for Assets.

An administrator has no right to sell land of his intestate for assets which, subject to the lien of a judgment, had been conveyed by the intestate, unless such conveyance had been made to defraud creditors. *McCaskill* v. *Graham*, 190.

ADVANCING CAUSE FOR ARGUMENT.

Where an action involving title to public office is tried after the beginning of a Term of the Supreme Court and, on appeal from the judgment rendered, by observing the Statutory regulations, has come to such Term of the Supreme Court after the call of the District to which the cause belongs, the Court can, under Rule 13, set the case down for argument, though it is not entitled to be heard as of right. *Caldwell* v. *Wilson*, 423.

ADVERSE POSSESSION.

1. For the purpose of acquiring title by prescription the possession of a tenant or of a purchaser under a bond for title, is the possession of the landlord or of the vendor respectively. *McNeill* v. *Fuller*, 209.
2. Open and continuous adverse possession of land for twenty years will give title in fee to the possessor as against all *persons* not under disability. *Walden* v *Ray*, 237.
3. Thirty years adverse possession of land will bar an action by the State and such possession need not be continuous nor need there be any connection between the tenants. *Ibid.*

AFFIDAVIT IN APPLICATION TO APPEAL IN FORMA PAUPERIS, 603.

AFFIRMANCE OF JUDGMENT BELOW, 504.

AGENCY OF HUSBAND:

A husband may be the agent of his wife in the management of her separate estate and for his contracts, as such agent, made for the support of herself and family, her separate estate is liable. *Bazemore* v. *Mountain*, 59.

AGENT:

A husband may be the agent of his wife in the management of her separate estate and make it liable for his contracts as such. *Bazemore* v. *Mountain*, 59.

AGENT, Unauthorized Transfer of Note by, 122.

ALLOTMENT OF HOMESTEAD.

It is not necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the County in which the homestead is situated, (provided it is filed in the judgment roll of the action in which the judgment was rendered) in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire. The filing of the return in the judgment roll, in compliance with Section 504 of *The Code*, is constructive notice to all who have dealings with the homesteader concerning the homestead. *Bevan* v. *Ellis*, 224.

ALTERATION OF CONTRACT, Attempted, 509.

AMENDMENT, 118.

1. A motion to amend a complaint after answer has been filed will not be allowed as a matter of course. *Goodwin* v. *Fertilizer Co.*, *91.*
2. The allowance or refusal of a motion to amend pleadings is a matter within the discretion of the trial judge and no appeal lies therefrom. *Ib.*
3. An amendment to a complaint, the effect of which is to confer and not merely to *show* jurisdiction, will not be permitted; hence, where the amount sought to be recovered in an action brought in the Superior Court was not within its jurisdiction, the plaintiff

cannot be allowed to amend his complaint by changing the cause of action and increasing the amount of the recovery prayed for so as to bring it within such jurisdiction. *Gilliam* v. *Life Ins.*, 369.

4. When to amend a complaint in an action would have the effect of depriving the defendant of the benefit of the plea of the Statute of Limitations, which could be used against an original action, the amendment will not be allowed. *Ibid.*

AMENDMENT OF JUDGMENT: 110.

AMENDMENT OF RECORD:

1. Where defendant, who was under bond to appear before a Justice of the Peace for trial, failed to appear, and the Justice caused him to be called and entered the default on the docket, but failed to enter it on the bond as required by Chapter 133, Acts of 1889; it was not error, in the trial of an action on the bond, for the Court, upon ascertaining the facts; to require the Justice of the Peace, who was present, to make the proper entry on the bond of defendant's default, such direction being merely for the purpose of perfecting the record. *State* v. *Jenkins*, 637
2. Where the record in the trial of an action on an appearance bond did not show that a judgment *nisi* had been entered against the principal in the Superior Court, it was not error for the Court, on ascertaining that such judgment had been taken to require the record to be amended so as to show that fact. *Ibid.*

AMENDMENT TO COMPLAINT SETTING UP NEW CAUSE OF ACTION: 392.

APPEAL: 106.

1. The allowance or refusal of a motion to amend pleadings is a matter within the discretion of the trial Judge and no appeal lies therefrom. *Goodwin* v. *Fertilizer Co.*, 91.
2. A statement of case on appeal signed only by the appellant's counsel with nothing to show that it was served within the prescribed time, or at all, upon the appellee or his counsel, is a nullity. *Hicks* v. *Westbrook*, 131.
3. The absence of a case on appeal does not entitle the appellee to have appeal dismissed, but, if no error appears on face of the record proper, the judgment below will be affirmed. *Ibid.*
4. An appeal from the judgment of a Clerk of the Superior Court refusing leave to issue execution on a judgment may be heard by

the resident or presiding Judge of the district at Chambers in another County. *McCaskill* v. *McKinnon*, 192.

5. When, for any reason, one of the five members of this Court does not sit and the Court is evenly divided on the hearing of an appeal, the judgment below will be allowed to stand not as a precedent but as the decision in the case *Puryear* v. *Lynch*, 255.

6. It cannot be assumed that an assignment of error is a correct statement of the facts therein recited when such facts do not appear in the case stated by the trial Judge. *Patterson* v. *Mills*, 258.

7. When the petition for a *certiorari* is not verified as required by Rule 42, and no transcript of the record proper is filed, and no sufficient reason is given for the failure to docket the record and case on appeal, the motion will be denied. *Critz* v. *Sparger*, 283.

8. The failure of the Clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from *laches*. *Ib.*

9. Where a case was tried below after the commencement of the Term of this Court to which the appeal was taken appellant is not prejudiced by a refusal of his motion for a *certiorari* returnable at such Term, but may docket his appeal at the next Term. *Ib.*

10. When the petition for a *certiorari* as a substitute for an appeal has not been verified as required by Rule 42, and no transcript of the record has been filed and no excuse shown for the failure to file it, the motion will be denied *Rothchild* v. *McNichol*, 284.

11. Though, in such case, the motion for a *certiorari* is denied, the appellant may docket the appeal at the Term of this Court to which it was taken before a motion is lodged for its dismissal or, if the case was tried below since the commencement of the Term to which the appeal was taken, the appellant may docket the appeal regularly at the next Term. *Ib.*

12. Error not excepted to on the trial below will not be considered in this Court unless apparent upon the record. *Cunningham* v. *Cunningham*, 413.

13. Where an appeal has been dismissed under Rule 5, for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial Judge, on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. *Parker* v. *Railway Company*, 501.

14. Failure of counsel to answer a motion to dismiss an appeal regularly made is not excused because he did not think the motion would be considered at once. *Ib.*

15. The proper course for an appellant, the settlement of whose case on appeal has been delayed without his default, is to docket the record proper during the first two days of the call of causes, from the District and ask for a writ of *certiorari* for the case on appeal. *Ib.*

16. An endorsement by counsel, who accepted service of case on appeal adding the date and stating that he did not waive the objection that the case was served too late, was competent and properly certified by the Clerk as a part of the proceedings in the case. *Barrus* v. *Railroad Co.*, 504.

17. The settlement of a case on appeal by the Judge does not cure the failure to serve the case within the time fixed by law. *Ib.*

18. The absence of a legally settled case on appeal does not entitle the appellee to have the appeal dismissed but, where no error appears on the face of the record proper, judgment must be affirmed. *Ib.*

19. An exception to issues submitted or for failure to submit issues tendered can not be sustained where those submitted properly arose upon the pleadings. *James* v. *Railroad*, 530.

20. An exception to the refusal of a prayer to instruct the jury that there is no evidence will not be considered in this Court where the case on appeal does not set out the evidence itself or contain a statement that there was no evidence, the presumption being that the trial Judge charged the jury correctly upon the evidence adduced on the trial. *Ib.*

APPEAL, Dismissal of, 92:

Where an appellant fails to have printed as a part of the record on appeal an exhibit which was made, by the Judge or by agreement of counsel, a part of the case on appeal, the appeal will be dismissed. *Fleming* v. *McPhail*, 183.

APPEAL, Docketing of, 423:

Although, under rule 17, the appellee may move to dismiss an appeal for appellant's failure to docket the same within the first two days of the call of the docket as required by Rule 5, yet such motion is too late if not made promptly and before the appellant actually dockets the appeal within the week but after the second day of the call. *Smith* v. *Montague*, 92.

APPEAL FROM JUSTICES' COURT:

Where a Justice of the Peace delayed rendering judgment until after the trial and the defendant (the party cast) hearing of the judgment, served a written notice of appeal on the plaintiff and the Justice, on demand of defendant and the payment of his fees, made up the case and sent the same to the Superior Court where it was docketed, it was error in the Judge below to dismiss the appeal on motion of the plaintiff, upon the ground that no formal notice of the appeal was served upon the Justice of the Peace, and that no notice of appeal was given at the trial. *Osborne* v. *Furniture Company*, 364.

APPEAL IN CRIMINAL CASES:

1. Appeals in criminal cases are regulated by the same rules as govern those in civil cases and must be begun and perfected according to the requirements of law on that subject. *State* v. *Cameron*, 572.
2. The statement of case on appeal in a criminal case must be submitted to the State's Solicitor for the District where the case is tried for acceptance or objection. *Ib.*
3. Counsel for a private prosecutor, who aids the Solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal. *Ib.*
4. Where the State's Solicitor is not present at the trial of a criminal prosecution, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the Court, and, in such case the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal. *Ib.*
5. Where the error complained of is the refusal of a prayer for instruction that there was no evidence to go to the jury against the defendant, it is the duty of the appellant to justify his prayer by showing that there was no such evidence, either by stating that as a fact in his case on appeal or by setting out the evidence therein and showing thereupon that there was really no evidence on the material point. *State* v. *Wilson*, 650.
6. Where the State's solicitor agrees that the Judge's notes of the testimony shall be a part of the record on appeal and such notes are incomplete, but are the only record of the evidence, he is bound by the insufficiency of the evidence shown thereby. *Ib.*

APPEAL, Costs of in Criminal Cases:

There being no statute authorizing it, the officers of this Court are not entitled to collect from a county the costs accruing in this Court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal *in forma pauperis*, and is insolvent. *Clerk's Office* v. *Commissioners*, 29.

APPEAL IN FORMA PAUPERIS:

The omission, in an affidavit to appeal *in forma pauperis*, of the averment that it is made in good faith, is a fatal defect and for such defect the appeal will be dismissed as a matter of right and not of discretion. *State* v. *Bramble*, 603.

APPEAL, Premature:

An appeal from an order of the Court below setting aside the verdict on one of several issues and awarding a new trial thereon is premature and will be dismissed. In such case, an exception should have been noted which could have been passed upon on the appeal from the final judgment. *Benton* v. *Collins*, 66.

APPEAL, Printing Record on:

1. The Rule requiring the record on appeal to be printed is complied with if the printing has been done when the case is called for argument. *Smith* v. *Montague*, 92.
2. Pleadings are not required to be printed as a part of the record on appeal (except when case comes up on demurrer) unless material, and, if material, this Court will not dismiss the appeal for failure to print but will simply order the additional printing. *Barbee* v. *Scroggins*, 135.

APPEARANCE BOND:

1. When one appears in Court, in obedience to the requirement of his bond, and submits himself to the jurisdiction of the Court, he continues under the penalty of the bond until the trial is terminated or until he is discharged by the Court. *State* v. *Jenkins*, 637.
2. Where a criminal case before a Justice of the Peace was not concluded on the day set for trial, and was postponed to a subsequent day, defendant's bond to appear on the day set for trial bound him to appear on the day to which the adjournment was made. *Ibid.*
3. Where defendant, who was under bond to appear before a Justice of the Place for trial, failed to appear, and the Justice caused him to be called and entered the default on the docket, but failed to enter it on the bond as required by Chapter 133, Acts of 1889; it was not error, in the trial of an action on the bond, for the Court, upon

ascertaining the facts, to require the Justice of the Peace, who was present, to make the proper entry on the bond of defendant's default, such direction being merely for the purpose of perfecting the record. *Ib.*

4. Where the record in the trial of an action on appearance bond did not show that a judgment *nisi* had been entered against the principal in the Superior Court, it was not error for the Court, on ascertaining that such judgment had been taken to require the record to be taken so as to show that fact. *Ib.*

APPEARANCE, Voluntary:

The object of a summons being to bring the defendant into Court by giving him legal notice, his voluntary appearance, without limiting his appearance, is a waiver of a summons and he is as completely in Court as if he had been served therewith. *Caldwell* v. *Wilson*, 425.

ARBITRATORS:

1. Arbitrators need not go into particulars and assign the reasons upon which their award is based. *Mayberry* v. *Mayberry*, 248.

2. While corruption is good ground for setting aside an award, a mistake of fact is not, unless the arbitrators have made it through undue influence or the fraud of a party. *Ib.*

3. Where a controversy was submitted to arbitration and the arbitrators made their award by a simple announcement of the result, without stating their reasons or the law governing them in their finding, and there was no proof that undue influence was brought to bear upon them or that any evidence was excluded; *Held*, that the award is conclusive upon the parties and will not be set aside. *Ib.*

ARREST AND BAIL, 46.

ARREST OF JUDGMENT:

A judgment can be arrested in criminal cases only when the defect complained of appears upon a record proper. *State* v. *Furr*, 606

ARSON, 574:

An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within Section 1761 of *The Code*, which declares that any tenant who shall injure any tenant house of his landlord by burning, or in any other manner, shall be guilty of a misdemeanor. *State* v. *Graham*, 623.

ASSIGNMENT OF DEBT:

Any contract that constitutes an indebtedness or money liability may be assigned. *Bank* v. *School Committee*, 107.

ASSIGNMENT OF NOTE WITHOUT ENDORSEMENT, 122.

ASSIGNEE OF UNENDORSED NOTE:

1. The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and as such has, *prima facie*, the equitable title and can maintain an action thereon under Section 177 of *The Code*. *Reese* v. *Crumpton*, 122.
2. The transferee of an unendorsed negotiable note (unless payable to bearer) takes the paper subject to all equities which the maker has against the payee. *Ib.*
3. In an action by the transferee of an unendorsed negotiable note against the maker, the latter may show, in evidence, the conditions upon which it was executed and delivered to the payee in order to show a failure of consideration, such evidence not being a contradiction of the terms of the written contract but proof of an additional verbal agreement. *Ib.*

ATTORNEY GENERAL, Leave of the Relator to Sue for Office, 376.

ATTORNMENT OF MORTGAGOR AS TENANT TO MORTGAGEE, 70.

AUCTIONEER AT SALE OF LAND ACTING FOR PURCHASER:

Where a purchaser of land at a sale under a deed of trust procured the auctioneer to bid it off for him without the knowledge of the trustee, the sale is not void but voidable only and can be set aside only when the party seeking the rescission is able to place the purchaser in *statu quo* and offers to do so. *Russell* v. *Roberts*, 322.

AWARD OF ARBITRATORS:

1. Arbitrators need not go into particulars and assign the reasons upon which their award is based. *Mayberry* v. *Mayberry*, 248.
2. While corruption is good ground for setting aside an award, a mistake of fact is not, unless the arbitrators have made it through undue influence or the fraud of a party. *Ib*,
3. Where a controversy was submitted to arbitration and the arbitrators made their award by a simple announcement of the result,

without stating their reasons of the law governing them in their finding, and there was no proof that undue influence was brought to bear upon them or that any evidence was excluded; *Held*, that the award is conclusive upon the parties and will be set aside. *Ib.*

BIBLE ENTRIES AS TO AGE:

In the trial of an indictment for carnally knowing and abusing a female child between ten and twelve years of age, it was proper to allow her age to be shown by entries in a Bible where the witness states that he knew the handwriting of the child's mother, that the Bible had belonged to the mother and that the entries had been made by her and that she had been dead seven years. *State* v. *Hairston*, 579.

BILL OF LADING:

A bill of lading is both a contract and receipt; as a *contract* to carry and deliver the goods upon the terms and conditions specified in the instrument, it cannot be explained by parol testimony so as to alter its legal effect, in the absence of fraud or mistake, but as a *receipt* or acknowledgement of the quantity, character or condition of the articles, it may be explained, varied or contradicted like any other receipt *Manufacturing Co.* v. *Railway Co.*, 514.

BONA FIDES OF TOWN OFFICIALS, 589.

BOND FOR APPEARANCE. (See Appearance Bond).

BOUNDARY, Disputed, 366.

1. Actual possession of one tract of land does not give constructive possession of an adjoining tract separated from the other by distinct lines and boundaries. *Basnight* v. *Meekins*, 23.

2. Where, in the trial of proceedings to establish boundaries, under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession, but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff. *Ib.*

BOUNDARIES OF TOWN, 612.

"BROADSIDE" EXCEPTION:

A "broadside," or general, exception to the refusal of the trial Judge to give the instructions as asked, and for instructions given," will not be considered in this Court. *State* v. *Webster*, 586.

BURDEN OF PROOF, 34, 107, 115, 135, 166, 684.

1. When a transaction between parties occupying a fiduciary relation such as mortgagor and mortgagee, is impeached, there is a presumption of fraud, and the burden of proving the dealings to have been fair, *bona fide*, and without undue influence arising out of such relation, rests upon the party occupying the position of advantage. *Hines* v. *Outlaw*, 51.

2. When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. *Parker* v. *Harden*, 57.

3. In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Ib.*

4. Where, in an action to recover land, the defendant set up as title the alleged purchase of the land, by his ancestor, from the plaintiff's ancestor, J. S., and also pleaded the twenty years statute of limitations and admitted that plaintiffs were the heirs at law of J. S., and that the latter had died within 15 years prior to the commencement of the action, and the plaintiff's introduced testimony tending to show that the defendant had not been in possession of the land for 20 years; *Held*, that the burden of proof having been shifted upon the defendant, by the allegations in his answer and his admissions, to show a better title either by a valid conveyance from the common source to himself or his ancestor, or by making good his plea of the statute, it was error to non-suit the plaintiff. *Collins* v. *Swanson*, 67.

5. Under no circumstances can a verdict be directed in favor of the party upon whom the burden of proof rests. *Ib.*

6. If upon the trial of an indictment for entry on land after being forbidden, such entry is shown or admitted, the burden is upon the defendant to show that he entered under a *bona fide* claim of right. *State* v. *Durham*, 546.

7. In such case, in addition to defendant's testimony that he believed he had a right to enter he must show that he had reasonable ground for such belief, and in the absence of such additional evidence it is the duty of the trial Judge to instruct the jury that, if they believe the evidence, the defendant is guilty. *Ib.*

8. Where, in the trial of an issue of *devisavit vel non*, the sanity of the testator is impeached, the burden of proof is upon the caveators. *In re Burn's Will*, 336.

BUILDING & LOAN ASSOCIATION:

A stockholder of an insolvent Building and Loan Association, who was also a borrower of its money on mortgage is not entitled to have the excess of the proceeds of the sale of his mortgaged property, over the mortgage debt, paid to him, when his *pro rata* share of the deficiency in the assets of the concern is equal to such excess. *Meares* v. *Davis*, 126.

BURGLARY:

In the trial of a person for burglary, it is not competent for him to show that other burglaries were committed in the same neighborhood about the same time as the one with which he is charged was committed. *State* v. *Smarr*, 669.

"BY:"

The word "by" when used as a designation of terminal point of time means "not later than." *Cotton Mills* v. *Dunstan*. 12.

"CALABOOSE," Construction of, 301.

CARNAL INTERCOURSE WITH CHILD BETWEEN TEN AND TWELVE YEARS OF AGE.

A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. *State* v. *Hairston*, 579.

CASE ON APPEAL. (SEE, ALSO, "APPEAL."):

1. Where, in the Court below, a dispute arose as to whether there had been service of a case on appeal, it was proper for the Judge to find the facts and, having found that there had not been such service within the statutory time, it was proper for him to order the appellant's "case on appeal" to be stricken from the files. *Hicks* v. *Westbrook*, 131.
2. A statement of case on appeal signed only by the appellant's counsel with nothing to show that it was served within the prescribed time, or at all, upon the appellee or his counsel, is a nullity. *Ib.*
3. The absence of a case on appeal does not entitle the appellee to have appeal dismissed, but, if no error appears on face of the record proper, the judgment below will be affirmed. *Ib.*
4. Where an appellant fails to have printed as a part of the record on appeal an exhibit which was made, by the Judge or by agreement of counsel, a part of the case on appeal, the appeal will be dismissed. *Fleming* v. *McPhail*, 183.

CASE ON APPEAL, Service of:

1. An endorsement by counsel, who accepted service of case on appeal adding the date and stating that he did not waive the objection that the case was served too late, was competent and properly certified by the Clerk as a part of the proceedings in the case. *Barrus* v. *Railroad Co.*, 504.
2. The settlement of a case on appeal by the Judge does not cure the failure to serve the case within the time fixed by law. *Ib.*

CATTLE, Impounding by Corporation:

1. Where a town ordinance made it the duty of the town constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited the authorities from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents. *Held*, that a sale of an impounded cow, belonging to a non-resident, for the cost of feeding her while impounded, was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the word "poundage or penalty." *Aydlett* v. *Elizabeth City*, 4.
2. When the purchaser, in such case, surrendered the cow to the true owner, he cannot recover from the town authorities the amount. *Ibid.*

CATTLE RUNNING AT LARGE:

It is not unconstitutional for the Legislature to prescribe that resident owners of stock found running at large in a town shall pay a higher penalty than non-resident owners, it being a discrimination forbidden neither by Article 1, Section 7, of the Constitution of the State nor by the 14th Amendment to the Constitution of the United States. *Broadfoot* v. *Fayetteville*, 418.

CAUSE OF ACTION:

1. Where parties to a contemplated litigation agreed that the disputed matters should be submitted to and heard by the Judge at the next ensuing Term of the Superior Court upon complaint, answer and the evidence, without summons being issued, and that his judgment on such hearing should be final and that either party failing to comply with such agreement should forfeit and pay to the other an agreed sum which might be sued for and recovered at any time after refusal to comply with such agreement; *Held*, that such contract was not illegal or against public policy and was

founded upon good and sufficient consideration, so that its violation gave a right of action against the party in default for the whole of the sum agreed upon as liquidated damages. *Pendleton* v. *Electric Light Co.*, 20.

2. The failure of the plaintiff in such contemplated action to take any steps toward bringing the matter to a hearing at the appointed term of Court, except a motion to file his complaint made late in the afternoon of the last day of the term and just as the Judge was preparing to leave the bench, was not a compliance with the terms of the agreement, under which the adverse party had the right to expect that the complaint would be filed regularly and in good time and that the trial of the matter would be in the Court House and in the usual hours of business. *Ib.*

CAUSE OF ACTION, When it Accrues:

The Statute of Limitations begins to run against a cause of action as soon as the plaintiff, being then under no disability, is at liberty to sue. *Eller* v. *Church*, 269.

CERTIFICATE OF COMPETENCY TO PRACTICE MEDICINE OR TO ENGAGE IN OTHER SKILLED OCCUPATION, 643.

CERTIORARI, 384:

1. When the petition for a *certiorari* is not verified as required by Rule 42, and no transcript of the record proper is filed, and no sufficient reason is given for the failure to docket the record and case on appeal, the motion will be denied. *Critz* v. *Sparger*, 283.
2. The failure of the Clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from *laches*. *Ib.*

CESTUI QUE TRUST:

A *cestui que trust* may buy at the trust sale for his benefit. *Monroe* v. *Fuchtler*, 101.

CHANGE OF VENUE, 669.

CHARACTER, Testimony Concerning:

While a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person; hence, defendants charged with rape cannot prove by their witness as to character of prosecutrix that such character was bad for virtue. *State* v. *Hairston*, 579.

CHARGE ON LAND:

Where land is devised to a person if he will pay a certain sum, and there is no devise over to another, the limitation will be considered a charge upon the land rather than a condition precedent, since the law favors a vesting of estates rather than estates upon such condition. *Allen* v. *Allen*, 328.

CHARGE ON SEPARATE ESTATE OF MARRIED WOMAN, 387.

CHARTER OF CORPORATION SUBJECT TO REPEAL, 1.

CITIES AND TOWNS, 301.

CITY IMPROVEMENTS:

1. The use of a street for laying pipes, &c., in furnishing water lights, &c., does not impose any additional servitude beyond those reasonably included in the dedication of all streets. *Smith* v. *City of Goldsboro*, 350.
2. Where plaintiff, while owner of lands adjacent to a City, platted and divided the same into "lots" and "streets" and sold all the lots to purchasers but made no conveyance of the streets, subsequently the corporate limits of the City were extended so as to include the lands; *Held*, that the plaintiff is entitled to no damages against the City for using the streets to fulfill its duty to the purchasers of the lots in furnishing them water and lights, such use not creating any additional servitude not contemplated by their dedication. *Ib.*

CLAIM OF RIGHT:

1. If upon the trial of an indictment for entry on land after being forbidden, such entry is shown or admitted, the burden is upon the defendant to show that he entered under a *bona fide* claim of right. *State* v. *Durham*, 546.
2. In such case, in addition to defendant's testimony that he believed he had a right to enter he must show that he had reasonable ground for such belief, and in the absence of such additional evidence it is the duty of the trial Judge to instruct the jury that, if they believe the evidence, the defendant is guilty. *Ib.*

CLERK OF SUPERIOR COURT:

Where letters of administration are issued to one person, who qualifies, the power of the Clerk, in that respect, and as to that Estate, are exhausted and the subsequent appointment of another person as administrator, before the first appointment is revoked, is void. *In re Bowman's Estate.*

CLERK OF SUPERIOR COURT, Appeal from judgment of:

Under Chapter 276, Acts of 1887, amendatory of Section 255 of *The Code*, the Judge, to whom a cause is sent by appeal or otherwise from the Clerk of a Superior Court, has full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the Clerk to be proceeded with by him. *Faison* v. *Williams*, 152.

CLERK OF SUPERIOR COURT, Duty of in Making Transcripts of Record on Appeal, 574.

CLERK OF SUPREME COURT:

There being no statute authorizing it, the officers of this Court are not entitled to collect from a County the costs accruing in this Court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal *in forma pauperis* and is insolvent. *Clerk's Office* v. *Commissioners*, 29.

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COHABITATION CANNOT CURE THE ILLEGALITY OF A MARRIAGE VOID ON ACCOUNT OF LUNACY, 297.

COLLATERAL FACTS, Evidence of: 95.

1. It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a collateral offence will be heard to prove the intent of the offence charged. *State* v. *Graham*, 623.
2. In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible. *Ib.*

COLLECTOR:

1. A collector of the estate of a decedent who resists the claim of the executor of the estate to a fund in his hands which, after litigation, is awarded to the executor, is not entitled to an allowance for counsel fees paid by him in such litigation. *Johnson* v. *Marcom*, 83.
2. The allowance of expenditures of a collector of an estate is, under Section 1524 of *The Code*, within the original jurisdiction of the Clerk of the Superior Court and the Court at Term has no power to make an allowance to the collector for counsel fees paid by him in a litigation in which he attempted to defeat the rightful claim of the executor to a fund in his hands. *Ib*

COLOR OF TITLE:

1. Where, in an action to have a parol trust declared in land and to have the legal estate conveyed accordingly, a verdict was rendered in 1875 for the plaintiff and a *nunc pro tunc* judgment fixing the parol trust was rendered on the verdict in 1880, and the subsequent proceedings in said action were directed to other purposes than to establish such parol trust, deeds for parts of such land made by the holder of the legal estate in 1877 or 1885 to grantees, who went into possession and held aversely to all the world and were not made parties to the action until 1893, were color of title which ripened into full title by seven years possession. *Taylor* v. *Smith*, 76.

2. Where an administrator procured a bidder to buy his intestate's land at an unauthorized sale and the bidder immediately reconveyed to the administrator individually, and no money passed at either transaction; *Held*, that the bidder's deed to the administrator was color of title without reference to the lack of the administrator's authority to sell or to the character of the transaction. *McNeill* v. *Fuller*, 209.

3. Prior to the Revenue and Machinery Acts of 1887, a Sheriff's deed under a sale for taxes was (without other evidence) only color of title and not effective, unless aided by open, notorious and continuous possession for the statutory period. *Worth* v. *Simmons*, 357.

COMMISSION, Railroad. (See "RAILROAD COMMISSION.")

COMMON CARRIERS: (See, also, "RAILROADS.")

1. A bill of lading is both a contract and receipt; as a *contract* to carry and deliver the goods upon the terms and conditions specified in the instrument, it cannot be explained by parol testimony so as to alter its legal effect, in the absence of fraud or mistake, but as a *receipt* or acknowledgment of the quantity, character or condition of the articles, it may be explained, varied or contradicted like any other receipt *Manufacturing Co.* v. *Railway Co.*, 514.

2. Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption. *Ib.*

3. When a box of goods is shipped over connecting lines and the terminal line receives the box in apparently good condition and marks the bill of lading "O. K." and the goods are found to be damaged at the end of the line, a rebuttable presumption is raised that the damages occurred on that line. *Ib.*

4. If the condition of the contents of a box is unknown to a railroad which receives it for transportation over its line, a failure to guard against liability for the condition of such goods by examination or stipulation is negligence. *Ib.*

COMMON SOURCE OF TITLE:

Where, in an action to recover land, plaintiff and defendant claim title from a common source, the plaintiff is required only to show the better title from such source. *Collins* v. *Swanson*, 67.

COMPLAINT IN ACTION FOR DIVORCE, 118.

COMPOUNDING FELONY:

Where parties charged with larceny were arrested and taken before a

Justice of the Peace and were discharged after the payment of the costs and a sum of money agreed upon between them and the prosecutor, such voluntary payment was evidence of their guilt of the larceny charged in the warrant, and the acceptance of the costs from the defendants by the magistrate was some evidence against him on the trial of an indictment for compounding the felony. *State* v. *Furr*, 606.

COMPROMISE, Binding Effect of:

The acceptance, by telegram, of an offer, made by telegram, to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by the debtor of the amount which was retained by the creditor, constitutes a contract, by way of compromise in full satisfaction of the claim, which the creditor has no right to alter by the form of receipt given for the money. *Pruden* v. *Railroad Co.*, 509.

CONCEALED WEAPONS:

1. The gist of the offence of carrying a concealed weapon about one's person and off one's own premises, consists in the guilty intent to carry it concealed and not in the intent to use it. *State* v. *Reams*, 556.
2. The concealed possession of a weapon about one's person and off his own premises raises the presumption of guilt which may be rebutted, and whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. *Ib.*
3. Where, in the trial of an indictment for carrying a concealed weapon, it appeared that the defendant had on no overcoat and had put his pistol, 10 or 11 inches long, in an upper outside coat pocket and that the handle and two inches of the breech were exposed to view and that when it was handed to him to take on a journey he said he did not intend to conceal it, it was error to instruct the jury that, if they believed from the evidence that any part of the pistol was concealed, that it could not be seen from the outside, they should find the defendant guilty. *Ib.*

CONDITIONS IN FIRE INSURANCE POLICY, 290.

CONDITION IN MORTGAGE:

A mortgage on realty and personalty to secure a debt payable in installments provided that, upon the payment of installments amounting to $350, the personalty should be released but that, in default in payment of one of the installments, all should become due and the mortgagee might take possession and sell. The mortgagor being in default, the mortgagee on the 6th of March, instituted an action for the possession of the personal property which was on that day seized by the sheriff and three days thereafter was delivered to the plaintiff. On the 10th of March the defendant, mortgagor, tendered to the plaintiff an amount which, added to the installments paid, equalled $350 and interest and costs of the proceeding which, being refused, was deposited with the Clerk of the Court for benefit of the plaintiff. *Held,* that, upon such payment into Court, the mortgage on the personalty was *eo instanti* released and the plaintiff should have discontinued his action. *Barbee* v. *Scoggins,* 135.

CONDITION PRECEDENT, 328.

CONDITIONAL SALE:

A written contract although called a "lease on the installment plan" and not providing that title shall pass upon the completion of the payment of the installments, may constitute a "conditional sale" of an article where the same has been delivered upon a payment in advance and an agreement to pay a certain sum each month for a series of months. *Manufacturing Co.* v. *Gray,* 168.

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CONSENT TO MARRIAGE, Not the Only Essential, 650.

CONSENT:

Consent of parties cannot give jurisdiction where it does not attach under the Constitution and laws. *Carey* v. *Allegood,* 54.

CONSIDERATION, 20.

CONSPIRACY TO PROCURE SEDUCTION OF UNMARRIED WOMAN:

Conspiracy to encompass the seduction of a young unmarried woman is indictable at common law. *State* v. *Powell,* 635.

CONSPIRACY TO PROCURE SEXUAL INTERCOURSE THROUGH SHAM MARRIAGE:

A marriage pretendedly celebrated before an unauthorized person being a nullity and not capable of being legalized by consent, a conspiracy to procure sexual intercourse with a woman through such pretended marriage is an indictable offence. *State* v. *Wilson*, 650.

CONSTABLE'S BOND, Liability of for Escape:

A constable is not liable on his official bond for the release of a prisoner arrested by him on void process. *Appomattox Co.* v. *Buffaloe*, 37.

CONSTABLE, Right to Execute Process, 287:

A town or city constable cannot execute process outside of his town or city unless directed to him in the name of the office he holds,—that is, as constable of his town or city. *Appomatox Co.* v. *Buffaloe*, 37.

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CONSTITUTIONAL REQUIREMENTS AS TO PASSAGE OF STATUTE:

Section 14, Article 2, of the Constitution providing that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings which readings shall have been on three different days, and agreed to by each House respectively, and unless the *yeas* and *nays* on the second and third readings of the bill shall have been entered on the "Journal," is mandatory. *Commissioners* v. *Snuggs*, 394.

CONSTRUCTION OF WRITTEN CONTRACT, 148:

1. The meaning of the terms of a written contract is a question of law for the Court alone to determine. *Edwards* v. *Railroad Co*, 490.
2. Where a letter from an employer stated: "You have been appointed general storekeeper for the system to take effect July 15th. Your salary will be $1,800 a year;" and the appointee entered upon his duties and received $150 per month until he was discharged; *Held*, that the contract was not an employment by the year, the reasonable construction of the contract being that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will. *Ib.*

CONSTRUCTIVE NOTICE, 258:

The principle of constructive notice arises out of the duty of an intending purchaser of land to reasonably and in common prudence see that his vendor has, *prima facie*, a good title; and while, because of such duty, he is affected with notice of the provisions of such deeds and other documents as are necessary to show the vendor's title, yet when he finds upon record a deed to his vendor from the former owner conveying an absolute estate in the land, he is not affected with notice of the provisions of the grantor's will recorded in the Clerk's office executed prior to the deed and devising the land to the grantee in such deed subject to a charge. *Allen* v. *Allen*, 328.

CONSTRUCTIVE POSSESSION:

1. Actual possession of one tract of land does not give constructive possession of an adjoining tract separated from the other by distinct lines and boundaries. *Basnight* v. *Meekins*, 23.
2. Where, in the trial of proceedings to establish boundaries, under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession,

but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff. *Ib.*

3. While the possession of a tenant of a parcel of land within a general boundary of land belonging to his lessor, is in law, the possession of the lessor up to the boundaries contained in the latter's deed, it is different as to the possession of a purchaser of such parcel, since the vendee, while deriving title from his vendor, does not hold possession under him, and his possession extends no further than the boundaries included in his own deed. *Worth* v. *Simmons*, 357.

4. Where in the trial of an action for the recovery of a parcel of land admitted to be within a boundary described in a tax deed executed before 1887, there was no actual possession under such tax deed shown by the plaintiff, or those under whom he claimed, deeds executed by the grantee in such tax deed and by his heirs and by a Commissioner in partition proceedings, after the death of such grantor, for certain parcels of land admittedly within the boundary of the tax deed, were inadmissible, as well as the possession of the purchasers under such deeds, to show the possession of plaintiff, or of those under whom he claimed, of any part of the tax deed boundary outside of the lands included in the deeds so offered. *Ib.*

CONTRACT, 144;

1. A surety for the faithful performance of duty by an agent, in an obligation of the form called a "continuing guaranty," has the right to withdraw from such obligation by giving notice to the principal, and is not liable for any defaults of the agent in matters entrusted to him after the service of such notice. *Manufacturing Co.* v. *Draughan*, 88.

2. The construction of a contract does not depend upon what either party intended but upon what both agreed. *Thomas* v. *Shooting Club*, 238.

3. The law implies a promise to pay for work done and accepted and, in the absence of an agreed price or an understanding that nothing is to be paid, the laborer may recover the reasonable value of his services. *Ib.*

4. Where plaintiff, at the instance of defendant, procured leases for the latter which were accepted, and plaintiff, expecting to obtain remunerative employment as steward for the defendant, did not intend to charge for getting up the leases but there was no agree-

ment that he would not do so; *Held*, that plaintiff was entitled to recover the reasonable value of his services. *Ib.*

5. The acceptance, by telegram, of an offer, made by telegram, to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by the debtor of the amount which was retained by the creditor, constitutes a contract, by way of compromise in full satisfaction of the claim, which the creditor has no right to alter by the form of receipt given for the money. *Pruden* v. *Railroad Co.*, 509.

CONTRACT, Assignability of:

Any contract that constitutes an indebtedness or money liability may be assigned. *Bank* v. *School Committee*, 107.

CONTRACT, Breach of:

1. Where parties to a contemplated litigation agreed that the disputed matters should be submitted to and heard by the Judge at the next ensuing Term of the Superior Court upon complaint, answer and the evidence, without summons being issued, and that his judgment on such hearing should be final and that either party failing to comply with such agreement should forfeit and pay to the other an agreed sum which might be sued for and recovered at any time after refusal to comply with such agreement; *Held*, that such contract was not illegal or against public policy and was founded upon good and sufficient consideration, so that its violation gave a right of action against the party in default for the whole of the sum agreed upon as liquidated damages. *Pendleton* v. *Electric Light Co.*, 20

2. The failure of the plaintiff in such contemplated action to take any steps toward bringing the matter to a hearing at the appointed term of Court, except a motion to file his complaint made late in the afternoon of the last day of the Term and just as the Judge was preparing to leave the bench, was not a compliance with the terms of the agreement, under which the adverse party had the right to expect that the complaint would be filed regularly and in good time and that the trial of the matter would be in the Court House and in the usual hours of business. *Ib.*

3. Where a father made a conveyance of lands to his son in consideration of the comfortable support of himself and wife during their natural lives, in default of which the grantee covenanted to reconvey; *Held*, that the grantor and his wife had the right to demand a reconveyance, on breach of the covenant, in entirety, with right of survivorship. *Stamper* v. *Stamper*, 251.

CONTRACT BETWEEN MORTGAGEE AND MORTGAGOR FOR SUPPLIES TO LATTER, 70.

CONTRACT BY MARRIED WOMAN FOR SUPPORT OF FAMILY:

1. The contract of a married woman, made for the support of herself and family, is valid and her separate estate is liable therefor. *Bazemore* v. *Mountain*, 59
2. A husband may be the agent of his wife in the management of her separate estate and for his contracts, as such agent, made for the support of herself and family, her separate estate is liable. *Ib.*
3. Where, in the trial of an action to subject the separate estate of a married woman to the payment of a debt alleged to have been contracted for the support of her family, it appeared that the wife owned farm lands in her own name, that her husband contributed nothing to the support of the family; that her only means of support was the rental from her lands which she was unable to rent without furnishing supplies to the tenants; that she had no supplies and could not furnish them except by contracting with some one else to do so and that she contracted with the plaintiff to furnish such supplies; *Held*, that such contract was for the benefit of the wife and family and necessary for their support and her separate estate is liable therefor. *Ib.*

CONTRACT IN INSURANCE POLICY:

Where a policy of insurance on a factory contained a condition that it should not be operated later than 10 o'clock at night and that a violation of such condition should create a forfeiture of the policy, and the premium required for a mill running day and night was much greater than for one running in day time only; *Held*, that such condition was a substantial provision of the contract and not a mere technicality and its violation vitiated the policy. *Alspaugh* v. *Insurance Co.*, 290.

CONTRACTS OF IDIOTS, LUNATICS, &c:

Idiots, lunatics and persons otherwise *non compos mentis*, being incompetent to enter into any valid contract, every person who deals with them, knowing their incapacity, is deemed to perpetrate fraud upon them and their rights, and equity will set aside such contracts upon the ground of such fraud, charging the lunatic with only such benefits as he actually received from the transaction. *Creekmore* v. *Baxter*, 31.

CONTRACT, Partial performance of, 318.

CONTRACT RELATING TO LAND:

1. Where parties made a contract for exchange of lands and one paid "boot money" and received deeds from the other and, in order to perfect title to the lands so conveyed to him, was compelled to pay off encumbrances which the other party should have discharged; *Held*, that such party is equitably entitled to have a lien for the amount so expended by him declared upon the lands which he agreed to convey but has not yet conveyed to the other, and to have such lands sold for the reimbursement of the sum so expended. *Rainey* v. *Hines*, 318.
2. A party to a contract for the purchase of land, who has given his notes for the purchase price, is at the wrong end of the contract to plead or take advantage of the Statute of Frauds when the vendor, who has executed no bond for title, is nevertheless able and willing to convey a good title. *McNeill* v. *Fuller*, 209.
3. When a party makes a contract for the purchase of land and then repudiates it, he cannot recover money paid thereon. *Davison* v. *Land Co.*, 146.
4. Where, in an action against a corporation for the balance due on a contract for the sale and purchase of land, the defendant denied the contract and set up a counter-claim for payments made by its officers without authority, to which there was no replication and, on the trial, the jury found that there was no contract; *Held*, that, notwithstanding the plaintiff's failure to reply to the alleged counter-claim, the defendant cannot recover thereon, since the payments upon which the counter-claim was based could not have arisen upon the "same transaction" alleged in the complaint, but found by the jury not to have taken place between the parties. *Ib.*

CONTRACT, Repudiation of, 146.

CONTRACT, Written:

The meaning of the terms of a written contract is a question of law for the Court alone to determine. *Edwards* v. *Railroad Co.*, 490.

CONTRIBUTORY NEGLIGENCE; (SEE, ALSO, "NEGLIGENCE" AND "RAILROADS").

Where, in the trial of an action for damages caused by defendant's negligence, there is no evidence tending to prove contributory negligence, the Court may instruct the jury that there was no contributory negligence. *White* v. *Railroad Co.*, 484.

CONVERSION:

In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker* v. *Harden*, 57.

CONVICTED CRIMINAL, 620.

CORAM NON JUDICE, 54.

CORPORATIONS: (SEE, ALSO, "RAILROADS" AND "RAILROAD CORPORATIONS.")

1. The General Assembly may, at its discretion, abolish municipal as well as other corporations. *Ward* v. *Elizabeth City*, 1.
2. Under Section 664 of *The Code*, a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. *Cotton Mills* v. *Dunstan*, 12.
3. Where the by-laws of a corporation provided that, if any stock holder should fail to pay his installments when called by the directors for two months, the stock should be declared forfeited and sold for account of the delinquent; publicly after thirty days notice, and that the proceeds of such sale should be applied to the payment of the amount due on the subscription and the balance, if any, should be paid to the delinquent but that such forfeiture and sale should not relieve the delinquent from his original subscription; *Held*, that such by-law was a reasonable one and the subscriber whose stock was duly declared forfeited and sold for less than its face value can be required to pay the difference between his subscription and the amount for which it was sold. *Ib.*
4. In order that the sale of the franchise and property of a corporation under mortgage shall have the effect of a dissolution of such corporation as provided in Section 697 of *The Code*, another corporation must be provided, as contemplated in Section 1936 of *The Code*, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation. *James* v. *Railroad Co.*, 523.
5. It was neither the purpose nor effect of Sections 697 and 698 of *The Code* to create a foreign corporation in this State. *Ib.*

CORPORATION, Deeds of:

1. An instrument purporting to be the deed of a corporation and executed in its name by its President with the word "seal" at the end

of the signature, is not effective as the deed of the corporation, either at common law or under Section 685 of *The Code.* Such deed is only the personal act of the President and is not admissible in evidence to prove a conveyance by the corporation. *Caldwell* v. *Manufacturing Co.*, 339.

2. An instrument purporting to be the deed of a corporation, signed by the President and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under Section 685 of *The Code*, for lack of the common seal, and, for the lack of such seal and attestation by Secretary, is not good at common law. *Ib.*

3. A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. *Ib.*

CORPORATION, Insolvent:

A stockholder of an insolvent Building and Loan Association, who was also a borrower of its money on mortgage, is not entitled to have the excess of the proceeds of the sale of his mortgaged property, over the mortgage debt, paid to him, when his *pro rata* share of the deficiency in the assets of the concern is equal to such excess. *Meares* v. *Davis*, 126.

COSTS:

When a new trial is granted on motion in this Court, for newly discovered evidence, the costs in this Court will fall on the party making the motion, unless in exceptional cases and for special reasons. *Herndon* v. *Railroad Co.*, 498.

COSTS IN CRIMINAL CASES:

1. Costs, in this State are entirely creatures of legislation and do not exist without it. *Clerk's Office* v. *Commissioners*, 29.

2. There being no statute authorizing it, the officers of this Court are not entitled to collect from a county the costs accruing in this Court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal *in forma pauperis* and is insolvent. *Ib.*

COUNSEL ASSISTING SOLICITOR IN CRIMINAL PROSECUTION:

1. Counsel for a private prosecutor, who aids the Solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal. *State* v. *Cameron*, 572.

2. Where the State's Solicitor is not present at the trial of a criminal prosecution, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the Court, and in such case, the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal. *Ib.*

COUNSEL FEES:

A collector of the estate of a decedent who resists the claim of the executor of the estate to a fund in his hands which, after litigation, is awarded to the executor, is not entitled to an allowance for counsel fees paid by him in such litigation. *Johnson* v. *Marcom*, 83.

COUNTER CLAIM:

1. Where, in an action against a corporation for the balance due on a contract for the sale and purchase of land, the defendant denied the contract and set up a counter claim for payments made by its officers without authority, to which there was no replication and, on the trial, the jury found that there was no contract; *Held*, that, notwithstanding the plaintiff's failure to reply to the alleged counter claim, the defendant cannnot recover thereon, since the payments upon which the counterclaim was based could not have arisen upon the "same transaction" alleged in the complaint, but found by the jury not to have taken place between the parties. *Davison* v. *Land Co.*, 146.

2. Though no counter claim is pleaded the Court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion. *James* v. *Railroad*, 530.

COUNTY, Creation of Debt by:

1. Section 14, Article 2, of the Constitution providing that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the *yeas* and *nays* on the second and third readings of the bill shall have been entered on the "Journal," is mandatory. *Commissioners* v. *Snuggs*, 394.

2. A County has no power, under Section 1996 *et. seq.* of *The Code* and

an affirmative vote of the qualified voters of the County, to issue bonds and levy a tax for their payment in aid of a railroad not begun before the adoption of the Constitution of 1868. *Ib.*

COUNTY, Liability of for Costs of Appeal in Criminal Cases:

There being no statute authorizing it, the officers of this Court are not entitled to collect from a county the costs accruing in this Court on appeal in a criminal case when the defendant was allowed to appeal without bond and without an order allowing him to appeal *in forma pauperis* and is insolvent. *Clerk's Office* v. *Commissioners*, 29.

COUNTY, Liability of for support of Pauper:

1. The liability of a County for the support of a pauper is determined by his "legal settlement" which is acquired by one year's continuous residence in the county and continues until a new one is acquired. *Commissioners* v. *Commissioners*, 295.
2. Where a pauper, temporarily absent from the County where he has a "legal settlement," is so disabled as to require immediate medical services and is furnished by the authorities of another County with such attention and board, the latter is entitled to recover the expenses thereof from the County where the pauper has his settlement. *Ib.*

COURT, Administrative:

The Railroad Commission established by Chapter 320, Acts of 1891, is purely of legislative origin and is *administrative* and not a judicial Court. *Caldwell* v. *Wilson*, 425.

COVENANT TO RECONVEY, Breach of:

1. Where a father made a conveyance of lands to his son in consideration of the comfortable support of himself and wife during their natural lives, in default of which the grantee covenanted to reconvey; *Held*, that the grantor and his wife had the right to demand a reconveyance, on breach of the covenant, in entirety, with right of survivorship. *Stamper* v *Stamper*, 251.
2. In such case the fact that, after the grantor's death, his wife allowed the grantee, her son, to return home after a term of outlawry and imprisonment, and live with her on the land until his death, was not a waiver of her right to a reconveyance. *Ib.*

CRIMINAL INTENT, 589.

CROTON OIL, When Administration of Dose is Assault and Battery, 677.

CRUEL AND UNUSUAL PUNISHMENT, What is not, 584.

DAMAGES, Action for:

A widow has no right of action against persons wrongfully causing the death of her husband, the Statute (*The Code*, Section 1498) giving a right of action alone to the personal representative of the person killed. *Howell* v. *Commissioners*, 362.

DAMAGES:

1. A mortgagor in possession of the mortgaged property with the consent of the mortgagee, after the day of payment has passed, is the owner of equity of redemption only but is liable for damages done to others in the use and enjoyment of the property. *James* v. *Railroad Co.*, 523.

DAMAGES, Measure of, 135.

DECLARATION OF CO-DEFENDANT:

Declarations of one of two defendants jointly on trial for larceny are admissible only as against the party making them and, if admitted, it is error not to instruct the jury that such declarations are incompetent as to the other defendant. *State* v. *Collins*, 667.

DEDICATION OF STREETS, 350.

DEED, Alteration of:

An alteration in or addition to a deed, such as filling up blanks therein, made by consent of the parties thereto, does not invalidate the instrument. *Martin* v. *Buffaloe*, 34.

DEED, Construction of:

1. Where the conveyancing clause of a deed of trust specified certain articles situated in a certain store, among them "one soda fountain," and, continuing, conveyed "all other property whatsoever in said store room" and it was admitted that there were two soda fountains in the room, one of which was set up in use and the other not; *Held*, that both fountains were covered by the deed, the conveyancing clause being broad enough to include everything in the store room at the time of its execution, although some of the articles were specified therein. *Merritt* v. *Kitchin*, 148.

2. Where, in the trial of an action, the controversy was whether a certain soda fountain had been conveyed by a deed of trust which, by its terms, conveyed specifically "one soda fountain" and other articles in a certain store room "and all other property whatsoever" in such store room, and it was admitted that there were two soda fountains in the store room, it was error to submit the deed of trust to the jury to say whether or not, as a fact, the fountain in question was intended to be conveyed, there being a patent ambiguity not explainable by parol testimony and the construction of the deed being a matter entirely of law and for the Court. *Ib.*

3. Where land was conveyed to A for life, with limitations over in the event of the happening of certain contingencies, but with full power in A to dispose of the same with the written permission of her husband; *Held*, that A and her husband can convey a good title in fee to a purchaser. *Wright* v. *Westbrook*, 155.

DEED, Defective Description in, 410.

DEEDS OF CORPORATIONS:

1. An instrument purporting to be the deed of a corporation and executed in its name by its President with the word "seal" at the end of the signature is not effective as the deed of the corporation, either at common law or under Section 685 of *The Code*. Such deed is only the personal act of the President, and is not admissible in evidence to prove a conveyance by the corporation. *Caldwell* v. *Manufacturing Co.*, 339.

2. An instrument purporting to be the deed of a corporation, signed by the President and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under Section 685 of *The Code*, for lack of the common seal, and, for the lack of such seal and attestation by Secretary, is not good at common law. *Ib.*

3. A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. *Ib.*

DEED UNREGISTERED, 258.

DEFAULT IN MORTGAGE, 70.

DEFECT IN RAILROAD BED, 492.

DEFECTIVE DESCRIPTION IN DEED:

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to *find* but not to *make* a corner. *Holmes* v. *Valley Co.*, 410.

DEFENSES, 122.

DEMAND ON OCCUPANT OF OFFICE FOR POSSESSION BEFORE ACTION TO RECOVER, 377.

DEPOSITIONS AS EVIDENCE, 413.

DESCRIPTION, Defective:

A description of land in a petition for partition as follows: "Thirty three or four thousand acres of land situate in the county of Surry, between Rockford and the Blue Ridge," is too vague and indefinite to be aided by parol evidence. *Worth* v. *Simmons*, 357.

DESCRIPTION IN DEED:

A description of land contained in a contract for its sale was "A certain tract or parcel of land lying between P's land and C's Creek and the old mill land." *Held*, that such a description was not too vague and indefinite to be explained by parol testimony fitting the description to the land. *Sherman* v. *Simpson*, 129.

DEVISAVIT VEL NON:

1. Where, in the trial of an issue of *devisavit vel non*, the sanity of the testator is impeached, the burden of proof is upon the caveators. *In re Burns' Will*, 336.
2. Where on trial of an issue of *devisavit vel non*, proof of the sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one to whom he left all his property, is competent evidence to be passed upon by the jury as bearing upon the capacity of the testator and, hence, is as much the proper subject of discussion by counsel, in the argument, as any other part of the testimony. (Montgomery, J., dissenting). *Ib.*

DEVISE:

1. A testator devised land as follows: "I loan the land whereon I now live to my daughter Mary during her natural life and give the same to the heirs of her body, but if she should have no lawful

heirs of her body, the said land at her death shall go back to my son William." *Held*, that the rule in Shelley's case has no application to the estate devised to Mary or William, the expression "heirs of the body," in view of the explanatory words contained in the clause, being construed "issue." *Bird* v. *Gilliam*, 326.

2. Where land is devised to a person if he will pay a certain sum, and there is no devise over to another, the limitation will be considered a charge upon the land rather than a condition precedent, since the law favors a vesting of estates rather than estates upon such condition *Allen* v. *Allen*, 328.

DISCRETION OF JUDGE:

1. It is a matter of dicretion of the trial Judge to allow a defendant, who has assumed the burden of proof, to open and conclude the argument. *Banking Co.* v. *Walker*, 115.
2. The refusal of a motion to set aside a judgment on the ground of surprise or excusable neglect is a matter of discretion with the Judge below and cannot be reviewed on appeal unless it should appear that such discretion was abused. *Cowles* v. *Cowles*, 272.

DISCRETION OF TRIAL JUDGE:

1. In the absence of constitutional or statutory prohibition, it is in the discretion of a trial Judge to permit the jury to visit the scene of the *res gestae*, in criminal and civil cases, whenever such visit appears important for the elucidation of the evidence but such visit must be carefully guarded to prevent conversation with third parties and no evidence must be taken. *State* v. *Perry*, 533.

DISCRETION OF TRIAL JUDGE, 533, 669.

DISCRIMINATION IN STATUTE, 418, 643.

DISMISSAL OF APPEAL, 131.

DIVIDED BENCH:

When, for any reason, one of the five members of this Court does not sit and the Court is evenly divided on the hearing of an appeal, the judgment below will be allowed to stand not as a precedent but as the decision in the case. *Puryear* v. *Lynch*, 255.

DIVORCE, Action for:

1. In an action for divorce, in which the defects in the complaint are not cured by the verdict, it is not sufficient to allege (following the words of Chapter 277, Acts of 1895) merely the abandonment

by the wife, and her living separate and apart from her husband, and her still refusing to live with him, but all the facts relied on as constituting the cause of action are required to be set forth specifically and definitely. *Ladd* v. *Ladd*, 118.

2. An act permitting divorces for past abandonment but not to apply to future cases of separation is constitutional. *Ib.*

DIVORCE, Action for:

An action for a divorce may be maintained by a guardian of a lunatic in the name of his ward. *Sims* v. *Sims*, 297.

DIVORCED HUSBAND, As Witness Against Wife:

Under Section 588, of *The Code*, a divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. *State* v *Raby*, 682.

DOCKETING APPEAL, 423.

DRAFT, Presentation of: 62.

DRUGGIST:

1. Where a druggist, at the request of a customer, dropped croton oil on a piece of candy which the purchaser gave to another person, and the latter ate the candy so drugged, to his serious inconvenience and injury, and the druggist knew, or had reason to believe that the dose was intended for such person, or some one else, as a trick and not for medicinal purposes: *Held*, that the druggist was guilty of assault and battery. *State* v. *Monroe*, 677.

2. In such case, it was not necessary, to constitute the offence, that the dose should be a poisonous or deadly one, but only that it should be an unusual dose likely to produce serious results. *Ib.*

DRUGS, Improper Administration of, 677.

"DUE PROCESS:"

1. Where a Railroad Commissioner, holding office under a Statute which makes it the duty of the Governor of the State to suspend him until the next meeting of the General Assembly in case he becomes subject to the disqualifications prescribed in the Statute, is cited by the Governor in writing to appear and answer certain charges recited in the notice as to his disqualification and, in response thereto, appears or files an answer, such notice is, in effect,

a citation and such appearance in person or by answer filed gives complete jurisdiction to the Governor and the consequent action of the Governor in suspending such Commissioner from office, followed by a notification of the suspension and an appointment of his successor, is "due process of law" *Caldwell* v. *Wilson*, 425.

2. "Due process" is such process as is due to the particular circumstances of a case according to the law of the land. It does not necessarily imply a regular proceeding in a Court of justice or after the manner of such Courts, and a party cannot be said to have been deprived of his property "without due process" when he has had a fair hearing according to the modes of proceeding applicable to such case. *Ib.*

3. A trial by jury in suits at common law pending in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirements of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial proceedings. *Ib.*

DUPLICITY IN INDICTMENT:

1. An indictment charging three defendants with conspiring to procure sham marriages between two of them and two women, is not bad for duplicity. *State* v. *Wilson*, 650.

2. Duplicity in a bill of indictment is ground only for a motion to quash and, being cured by verdict, is not ground for a motion in arrest of judgment. *Ib.*

ELECTION DAY, Giving Away Liquor on:

1. Where, in the trial of an indictment under Section 2740 of *The Code*, for giving away intoxicating liquor on an election day, it appeared that defendant casually found a bottle of whiskey and passed it to another who drank of it; *Held*, that such act was a violation of the Statute. *State* v. *Gibson*, 680.

2. It is not necessary, to constitute a violation of Section 2740 of *The Code*, that the selling or giving away liquor on election day shall be with the intent to influence any voter or with any intent. *Ib.*

ELECTION TO TAKE UNDER AND NOT AGAINST A WILL, 328.

ELECTION EXPENSES:

1. There is a manifest difference between contributions made by a candidate for office for his part of the necessary expenses of a po-

litical campaign, or paying persons to assist in conducting his own personal canvass and the giving of money or other things of value to electors in order to be elected. *Epps* v. *Smith*, 157.

2. In an action for the penalty imposed by Section 42 of Chapter 159, Acts of 1895, it is not necessary that the complaint should allege a wilful and corrupt intent on the part of the defendant in giving money, &c., to electors in order to be elected to office. *Ib.*

EMPLOYMENT, Contract of:

Where a letter from an employer stated: "You have been appointed general storekeeper for the system to take effect July 15th. Your salary will be $1,800 a year;" and the appointee entered upon his duties and received $150 per month until he was discharged; *Held*, that the contract was not an employment by the year, the reasonable construction of the contract being that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, leaving the parties to sever their relations at will. *Edwards* v. *Railroad Co.*, 490.

ENDORSERS, Accommodation:

The owner of a note endorsed by the payees for the accommodation of the maker may sue any one of several endorsers without joining the maker or any other endorser. *Bank* v. *Carr*, 113.

ENDORSEMENT OF NOTE, 122.

ENROLLING CLERK OF GENERAL ASSEMBLY, Indictment for Negligent Omission of Duty, 558.

EQUAL PROTECTION OF THE LAWS, 418, 425, 643.

EQUITABLE RELIEF:

1. Where a contract relating to land is not objectionable legally, it is as much a matter of course for a Court of Equity to decree specific performance as it is for a Court of Law to give damages for breach of such contract. *Stamper* v. *Stamper*, 251.

2. Where a father made a conveyance of lands to his son in consideration of the comfortable support of himself and wife during their natural lives, in default of which the grantee covenanted to reconvey; *Held*, that the grantor and his wife had the right to demand a reconveyance, on breach of the covenant, in entirety, with right of survivorship. *Ib.*

3. In such case the fact that, after the grantor's death, his wife allowed

the grantee, her son, to return home after a term of outlawry and imprisonment, and live with her on the land until his death, was not a waiver of her right to a reconveyance. *Ib.*

4. Where parties made a contract for exchange of lands and one paid "boot money" and received deeds from the other and, in order to perfect title to the lands so conveyed to him, was compelled to pay off encumbrances which the other party should have discharged; *Held*, that such party is equitably entitled to have a lien for the amount so expended by him, declared upon the lands which he agreed to convey but has not yet conveyed to the other, and to have such lands sold for the reimbursement of the sums so expended. *Rainey* v. *Hines*, 318.

EQUITABLE REMEDY NOT PROPER WHEN ACTION FOR DAMAGES WILL LIE:

Application for an injunction against the enforcement of a town ordinance alleged to be void is a misconception of remedy, as a Court of Equity will not interpose when the plaintiff's proper remedy is a civil action at law for damages. *Scott* v. *Smith*, 94.

EQUITABLE LIEN, 214:

1. Where husband and wife contracted for the purchase of a lot from C. and it was virtually agreed between all parties that the deed should be made to the wife and deposited by the grantor with plaintiff as collateral security for a loan of $1100 to be used in building a house on the lot and the deed was so made and deposited and the money was so lent and used; *Held*, that the transaction constituted a parol declaration of trust accompanying the transmission of title to the wife who took it subject to the trust which Equity will enforce in plaintiff's favor. *Bank* v. *Fries*, 241.
2. In such case, the wife is not entitled to a decree for the delivery of the deed to her until she "does equity" by paying the loan made for her benefit. *Ib.*

ERROR ON FACE OF RECORD.

This Court is bound to correct errors that appear on the face of the record on appeal whether they were excepted to below or not. *Appomattox Co.* v. *Buffaloe*, 37.

ESCAPE:

A constable is not liable on his official bond for the release of a prisoner arrested by him on void process. *Appomattox Co.* v. *Buffaloe*, 37.

ESTATE VESTED, 328.

ESTOPPEL, 248:

1. A defendant in an action to recover land, who sets up title through purchase of the land by his ancestor, is estopped to deny the title of the latter's grantor. *Collins* v. *Swanson*, 67.

2. A tenant being estopped from denying that the party from whom he leased is his landlord and entitled to the rents, cannot escape the landlord's lien by claiming his personal property exemption out of the crops. *Hamer* v. *McCall*, 196.

EVIDENCE, 144, 186, 256:

1. Where in the trial of proceedings to establish boundaries, under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession, but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff. *Basnight* v. *Meekins*, 23.

2. While transactions between near relatives, no one else being present, are suspicious and the testimony of one of the parties thereto should be carefully scrutinized, yet, if the testimony be of such a nature as to convince the jury of its truth, it is entitled to as much weight as that of any other witness. *Martin* v. *Buffaloe*, 34.

3 Where, on the trial of an action, a material fact is in dispute and the evidence thereon is conflicting, the trial judge cannot weigh the evidence and say how the fact was. *Burrus* v. *Life Insurance Co.*, 62.

4. To make evidence competent it must tend to prove the matter in dispute and not relate to collateral facts merely. *Short* v. *Yelverton*, 95.

5. Where, in the trial of an action for the price of goods alleged to have been sold to the defendant, the contention was whether the sale was made to the defendant or his tenants and the defendant denied the purchase and introduced his tenants who testified that they bought the goods from plaintiff on their own account, at a certain price, it was error to permit plaintiff to prove that the goods cost him what defendant's witnesses claimed to have bought them for in order to show the unreasonableness of their testimony, since such matter was collateral to the issue and not a part of the *res gestae*. *Ib.*

6. While the entry of satisfaction of a mortgage on the margin of the registry, witnessed by the Register of Deeds, is competent evidence of the payment of the debt secured thereby, yet, on an issue "What amount, if any, has been paid on the debt due to M. S.," by plaintiff's intestate, entry of satisfaction of intestate's mortgage to a third person, introduced for the purpose of showing that the alleged debt of M. S. arose from the officious payment by her of such mortgage and was, therefore, not a debt of the estate, was irrelevant and incompetent. *Robinson* v. *Sampson*, 99.

7. Notice to an administrator, defendant in an action, is, in law, notice to his attorney; and where, in the trial of an action, the administrator in reply to a notice to produce a note alleged to have been paid, stated that his intestate had told him that he had given it to his attorney, (who was also the administrator's attorney); *Held*, that the statement of the administrator, in return to the notice, reasonably meant that the intestate had given the note to his attorney as bearing on the matter of the suit, that the latter kept it in his possession and had it at the trial; and it was error to refuse plaintiff's request for an order on the attorney to produce the note. *Banking Co.* v. *Walker*, 115.

8. When no general authority to a clerk from his principal to endorse notes payable to the latter is shown, nor course of dealing from which such authority could be inferred, the fact that the clerk had endorsed other notes previously, with the sanction and approval of the payee, was no evidence sufficient to go to the jury in the trial of an action on a note that the clerk had authority to endorse the note to another. *Breesee* v. *Crumpton*, 122.

9. In an action by the transferee of an unendorsed negotiable note against the maker, the latter may show, in evidence, the conditions upon which it was executed and delivered to the payee in order to show a failure of consideration, such evidence not being a contradiction of the terms of the written contract but proof of an additional verbal agreement. *Ib.*

10. In cases where it is only sought to prove the existence or contents of a judgment it is only necessary to produce in evidence a duly authenticated copy of the judgment itself, a full copy of the proceedings in which the judgment was rendered being required only where the judgment is relied upon to establish any particular state of facts upon which it was based, or as matter of estoppel. *Rainey* v. *Hines*, 318.

11. Where on trial of an issue of *devisavit vel non*, proof of the sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one to whom he left all his property, is competent evidence to be passed upon by the jury as

bearing upon the capacity of the testator and, hence, is as much the proper subject of discussion by counsel, in the argument, as any other part of the testimony. (Montgomery, J., dissenting). *In re Burn's Will*, 336.

12. A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. *Caldwell* v. *Manufacturing Co.* 339.

13. In the trial of an action for trespass in which defendant set up as a defence the ownership of an easement in the land, a deed executed to it in correction of former defective deeds was properly rejected as evidence of title where the trespass occurred before the corrected deed and after the delivery of the defective deeds. *Ib.*

14. Where, in the trial of an action for the recovery of a parcel of land admitted to be within a boundary described in a tax deed executed before 1887, there was no actual possession under such tax deed shown by the plaintiff, or those under whom he claimed, deeds executed by the grantee in such tax deed and by his heirs and by a Commissioner in partition proceedings, after the death of such grantor for certain parcels of land admittedly within the boundary of the tax deed, were inadmissible, as well as the possession of the purchasers under such deeds, to show the possession of plaintiff, or of those under whom he claimed, of any part of the tax deed boundary outside of the lands included in the deeds so offered. *Worth* v. *Simmons*, 358.

15. Although testimony, which does not prove, or tend to prove the contention of either party to an action, is irrelevant and should properly be excluded, yet its admission is harmless error *Edwards* v. *Phifer*, 388.

16. In the trial of an action to declare invalid bonds of a County issued in pursuance of the authority of an Act of the General Assembly, it is competent to introduce in evidence the Journal of the House or Senate to show that such Act was not passed in conformity with the requirements of the Constitution, and when such Journal shows affirmatively that the Act authorizing the creation of the indebtedness, or the imposition of a tax, was not passed with the formalities required by Section 14, Article 2, of the Constitution, such Journal is conclusive as against not only a printed Statute published by authority of law, but also against a duly enrolled act, and such act is invalid so far as it attempts to confer the power of creating a debt or levying a tax. (*Bank* v. *Commissioners*, 119 N. C., 214, followed and *Carr* v. *Coke*, 116 N. C., 223, distinguished.) *Commissioners* v. *Snuggs*, 394.

17. Where, on the trial of an action, a deposition was objected to on the ground that the party offering it had failed to show that the deponent was out of the State or resided more than 75 miles from the place of trial, it was proper to allow the deposition to be read after the party offering it had, in answer to the objection, offered evidence tending to show, in the opinion of the trial Judge, that the witness was not in the State. *Cunningham* v. *Cunningham*, 413.

18. While the rule is that the law looks with suspicion upon the evidence of close relations and interested parties and it must be received with some degree of allowance, yet the rule does not reject or necessarily impeach it, and if, from the testimony or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. *State* v. *Lee*, 528.

19. Where the book of records of a Board of Township Trustees is shown to have been destroyed by fire, the making of an order discontinuing a certain road can be proved by one of the trustees. *State* v. *Durham*, 546.

20. In the trial of an indictment for seduction one H. testified, for the defence, that he had sexual intercourse with the prosecutrix prior to the date of the alleged seduction. One U. for the State, testified that in a conversation with him the said H. had stated, in reply to a question, that he had never had illicit intercourse with the prosecutrix and that she was a lady. Another witness for the State was allowed to testify that he was near H. and U. at the time of the conversation and that, hearing the name of the prosecutrix mentioned, he went near to the parties and heard H. say "It is not so, I always found her to be a lady." The latter testimony was objected to as fragmentary. *Held*, that the testimony was competent since it contained the whole matter in dispute and nothing that H. could have said could have explained it to mean anything other than that the prosecutrix was a virtuous woman, so far as he knew. *State* v. *Robertson*, 551.

21. On the trial of an indictment for rape and for carnally knowing and abusing a female child between ten and twelve years of age, it was not error to refuse to permit a witness to state that prosecutrix had proposed to have sexual intercourse with him, when defendants did not propose to show that the witness had actually had intercourse with her. *State* v. *Hairston*, 579.

22. Where, on the trial of a criminal action, the defendants, had, without the direction or sanction of the Court, caused the jailer

to bring a prisoner in the Court room to testify, it was not error for the trial Judge to order the witness to be sent back to jail after she had been examined for the defendants. *Ib.*

23. As forcible trespass is essentially an offence against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offence- *State* v. *Webster*, 586.

24. It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a collateral offence will be heard to prove the intent of the offence charged; hence. *State* v. *Graham*, 623.

25. In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible. *Ib.*

26 Declarations of one of two defendants jointly on trial for larceny are admissible only as against the party making them and, if admitted, it is error not to instruct the jury that such declarations are incompetent as to the other defendant. *State* v. *Collins*, 667.

27. In the trial of a person for burglary it is not competent for him to show that other burglaries were committed in the same neighborhood about the same time as the one with which he is charged was committed. *State* v *Smarr*, 669.

28. Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad; *Held*, that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. *State* v. *Traylor*, 674.

29. Where in the trial of an indictment for giving away intoxicating liquor on an election day, there was direct evidence that the defendant gave whiskey to one R. within the time and at the place as charged, it was not error to refuse an instruction that there was not sufficient evidence to convict. *State* v. *Gibson*, 680.

30. In the trial of an indictment for fornication and adultery evidence of facts transpiring after the finding of the bill of indictment and tending to show the guilt of the defendants, is admissible. *State* v. *Raby*, 682.

31. Where, in the trial of an indictment for fornication and adultery, a witness testified that defendants lived together about three months before they were married and had prior to that time, moved to a distant place and had returned; *Held*, that the evidence was sufficient to be submitted to the jury as to the guilt of the defendants. *Ib.*

32. In the trial of an indictment for fornication and adultery testimony that the defendants were seen working together in a field, although slight evidence of their guilt, was competent as tending to show, with other circumstantial evidence, that the defendants were living together in fornication and adultery. *Ib.*

33. Where, in the trial of one charged with murder, the wilful killing is admitted or proved and there is no evidence of self-defence, testimony as to the violent and dangerous character of the deceased and of his threats against the accused is not admissible *State* v. *Byrd*, 684.

34. On the trial of one charged with murder, evidence of threats by the deceased against the accused and of the violent character of the deceased is not admissible to show self-defence unless such character was known and such threats were communicated to the accused except in case where the evidence of the killing is entirely circumstantial. *Ib.*

EVIDENCE, Sufficiency of, 558, 604, 635, 680, 682.

"EVIDENCE OF DEBT" IS PERSONAL PROPERTY, 614.

EXCEPTIONS:

1. An exception to issues submitted or for failure to submit issues tendered can not be sustained where those submitted properly arose upon the pleadings. *James* v. *Railroad*, 530.

2. An exception to the refusal of a prayer to instruct the jury that there is no evidence will not be considered in this Court where the case on appeal does not set out the evidence itself or contain a statement that there was no evidence, the presumption being that the trial Judge charged the jury correctly upon the evidence adduced on the trial. *Ib.*

3. Exceptions to the sufficiency of evidence to support a verdict must be taken before verdict. *State* v. *Furr*, 606.

4. An exception that there is no evidence against the defendant to go to the jury on the trial of a criminal action, is too late when taken after verdict. *State* v. *Wilson*, 650.

EXECUTION:

An execution or order of sale issued by a Justice of the Peace cannot be set aside on original motion in the Superior Court. *Hamer* v. *McCall*, 197.

EXECUTION FROM THE SUPREME COURT, Will not be Recalled, When, 480.

EXECUTION OF DEED, Defective, 339.

EXCLUSIVE PRIVILEGES, 643:

It is not unconstitutional for the Legislature to prescribe that resident owners of stock found running at large in a town shall pay a higher penalty than non-resident owners, it being a discrimination forbidden neither by Article 1, Section 7 of the Constitution of the State nor by the 14th Amendment to the Constitution of the United States. *Broadfoot* v. *Fayetteville*, 418.

EXCUSABLE NEGLECT:

1. Where a judgment by default final was rendered against a defendant who had employed an attorney but had neither attended Court nor given any excuse for his absence and had given his attorney no information upon which to interpose a defence; *Held*, that his conduct was inexcusable negligence which did not entitle him to have the judgment set aside under Section 274 of *The Code*. *Cowles* v. *Cowles*, 272.
2. The refusal of a motion to set aside a judgment on the ground of surprise or excusable neglect is a matter of discretion with the Judge below and cannot be reviewed on appeal unless it should appear that such discretion was abused. *Ib.*

EXECUTOR, Effect of Qualification of:

Where a testator disposes of property belonging to the executor named in the will and at the same time and in the same will gives to such executor property of the testator, the executor by qualifying as such is held to make an election to take under the will and must execute it in all its provisions, his oath of office being irrevocable on his part. *Allen* v *Allen*, 328

EXPRESSION OF OPINION BY TRIAL JUDGE, What is Not, 551.

FAILURE TO WORK PUBLIC ROAD, 610.

FALSE RETURNS:

If a person by his acts or conduct induces another to believe that a fact is really in existence, when it is not, and thereby obtains money or property, he comes within the scope of the Statutes against false pretenses. *State* v. *Matthews*, 604.

FELLOW SERVANTS:

The conductor of a side tracked train whose duty it is to close the switch and give the "all right" signal for the clear passage of another train on the main line, is the fellow servant and not the vice principal of the locomotive engineer of the latter train both being employees of the same Company. *Pleasants* v. *Railroad Co.*, 492.

FEME COVERT. See "Married Woman."

FENCE, Division, Removal of, 679.

FIDUCIARY RELATIONS:

1. When a transaction between parties occupying a fiduciary relation such as mortgagor and mortgagee, is impeached, there is a presumption of fraud, and the burden of proving the dealings to have been fair, *bona fide*, and without undue influence arising out of such relation, rests upon the party occupying the position of advantage. *Hines* v, *Outlaw*, 51.
2. The fact that the trustee in a trust deed was a clerk for the *cestui que trust* does not create a fiduciary relation between the grantors and the latter. *Monroe* v. *Fuchtler*, 101.
3. A sale of land made by a trustee fairly and according to the provisions of the deed will not be set aside for mere inadequacy of price, unless such inadequacy is so great as to cause all acquainted with the value of the land to say at once, "The purchaser got it for nothing!" *Ib.*
4. A mortgagor being regarded as in the power of the mortgagee, the Courts require that the sale of personalty under a mortgage, like sales under execution, shall be made with such reasonable care as to produce the best results; hence, a sale by a mortgagee of a stock of merchandise, not in plain view but more than a hundred yards from the place of sale, and in a lump, was invalid. *Barbee* v. *Scoggins*, 135.

FIRE INSURANCE CONTRACT, 290.

FORCIBLE TRESPASS:

1. It is not necessary to allege in a bill of indictment for forcible trespass that the prosecutor at any time forbade the defendant to enter upon the land or that he was put in fear, and thus failed to forbid such entry, by reason of the great numbers or by the force manifested. *State* v. *Austin*, 620.
2. As forcible trespass is essentially an offence against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offence. *State* v. *Webster*, 586.

3. While to constitute forcible trespass the possessor must be present and forbidding or objecting, it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is *completed* which, if continued, becomes forcible after being forbidden even if not so in its incipiency. *Ib.*

FORECLOSURE OF MORTGAGE. See "Mortgage."

FOREIGN CORPORATION:

It was neither the purpose nor effect of Sections 697 and 698 of *The Code* to create a foreign corporation in this State. *James* v. *Railroad Company*, 523.

FORNICATION AND ADULTERY, 682.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION, 418, 425, 643.

FRACTIONS OF A DAY:

Where proper proceedings for the appointment of a receiver are begun in two different Courts and a different receiver is appointed in each case, this Court, in determining the priority of appointment, as between the receivers, will take notice of fractions of a day. *Worth* v. *Bank*, 343.

FRAUD, Charge of:

1. Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, and judgment by default was entered, the presumption is that the judgment was rendered on the note, as was right, and not on the charge of fraud, which the Court had no right to do. *Stewart* v. *Bryan*, 46.

2. Where the complaint in action set up two causes of action, one for indebtedness due on a note and the other for fraud in the embezzlement of the proceeds of collaterals deposited as security for the note, and, in default of appearance and defense, judgment was rendered on the note but not on the charge of fraud, the plaintiff was not entitled to an order of arrest under Sections 291 and 447 of *The Code*, as amended by Chapter 541, Acts of 1891, since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. *Ib.*

FRAUD IN LAW, 31.

FRAUD, Presumption of:

When a transaction between parties occupying a fiduciary relation such as mortgagor and mortgagee, is impeached, there is a presumption of fraud, and the burden of proving the dealings to have been fair, *bona fide*, and without undue influence arising out of such relation, rests upon the party occupying the position of advantage. *Hines* v. *Outlaw*, 51.

FRIGHTENING HORSES BY RAILROAD, 519.

FREE TRADER:

Under a reasonable construction of the Constitution and Section 1832 of *The Code*, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. *Brown* v. *Brown*, 8.

GENERAL ASSEMBLY, Power of, 1, 418:

It is competent for the General Assembly in creating an office, other than purely judicial, to reserve to itself the right to remove or to the Governor the right to suspend the incumbent of the office. *Caldwell* v. *Wilson*, 425.

GENERAL CHARACTER:

While a witness as to character may, of his own motion, say in what respect the character of the person asked about is good or bad, the party introducing him can only interrogate him as to the general character of such person; hence, defendants charged with rape cannot prove by their witness as to character of prosecutrix that such character was bad for virtue. *State* v. *Hairston*, 579.

GENERAL CHARACTER OF DEFENDANT, In Criminal Action:

Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad; *Held*, that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. *State* v. *Traylor*, 674.

GOVERNOR, Power of to Suspend Railroad Commission, 425.

GRAVES, Unlawfully Disturbing, 589.

GUARANTY, 144.

GUARANTY, Continuing;

A surety for the faithful performance of duty by an agent, in an obligation of the form called a "continuing guaranty," has the right to withdraw from such obligation by giving notice to the principal, and is not liable for any defaults of the agent in matters entrusted to him after the service of such notice. *Manufacturing Co.* v. *Draughan*, 88.

GUARDIAN AD LITEM, Appointment of, 287:

GUARDIAN OF LUNATIC.

1. An action for divorce may be maintained by a guardian of a lunatic in the name of his ward. *Sims* v. *Sims*, 297.
2. The appointment of a guardian for a lunatic is valid until the proceedings and orders under the inquisition are reversed. *Ib.*
3. *Ex parte* proceedings to have a lunatic declared sane, brought without service of notice upon the guardian of such lunatic, are a nullity as well as an order made in such proceedings removing the guardian without notice. (Section 217(3) of *The Code.*) *Ib.*
4. The report of a jury in an inquisition of lunacy need not be formally "confirmed" by the Clerk of the Superior Court, the Statute only requiring it to be "filed and recorded." *Ib.*

HOMESTEAD, Allotment of When Filed:

It is not necessary to have the appraisers' return of the allotment of the homestead registered in the office of the Register of Deeds of the County in which the homestead is situated, (provided it is filed in the judgment roll of the action in which the judgment was rendered) in order to make the judgment lien valid and binding on the homestead until the homestead estate shall expire. The filing of the return in the judgment roll, in compliance with Section 504 of *The Code*, is constructive notice to all who have dealings with the homesteader concerning the homestead. *Bevan* v. *Ellis*, 224.

HOMESTEAD, Lien of Judgment Upon:

The lien of a judgment on land in which a homestead has been duly allotted does not cease upon the expiration of ten years from the date of the judgment but continues during the continuance of the homestead estate, notwithstanding a sale and conveyance of the land by the homesteader. *Bevan* v. *Ellis*, 224.

HARMLESS ERROR, 135, 388.

"HEIRS OF BODY" MEANS "ISSUE," When, 326.

HOLD OVER OFFICER, 1.

HUSBAND AND WIFE, 186, 214:

1. Under a reasonable construction of the Constitution and Section 1832 of *The Code*, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. (Furches, J., dissenting.) *Brown* v. *Brown*, 8.
2. A husband may be the agent of his wife in the management of her separate estate and for his contracts, as such agent, made for the support of herself and family, her separate estate is liable. *Bazemore* v. *Mountain*, 59.
3. Where, in the trial of an action to subject the separate estate of a married woman to the payment of a debt alleged to have been contracted for the support of her family, it appeared that the wife owned farm lands in her own name, that her husband contributed nothing to the support of the family; that her only means of support was the rental from her lands which she was unable to rent without furnishing supplies to the tenants; that she had no supplies and could not furnish them except by contracting with some one else to do so and that she contracted with the plaintiff to furnish such supplies; *Held*, that such contract was for the benefit of the wife and family and necessary for their support and her separate estate is liable therefor. *Ib.*
4. While, in law, the earnings of a wife belong to the husband, he may give them to her or recognize and treat her as the owner of them, provided no creditors intervene. *Cunningham* v. *Cunningham*, 413.
5. Where, on the trial of an action by a widow to have the heirs of her deceased husband declared trustees for her in land alleged to have been paid for with her own earnings but conveyed to her husband through fraud or mistake; and no creditors intervened, and it was in evidence that the plaintiff and her daughter had paid for the land out of their earnings, it was error to refuse an instruction that, if the jury should find from the evidence that the land was paid for by such earnings, the plaintiff could not recover since, as a whole, the instruction prayed for would have been erroneous. *Ibid.*

IDIOTS, Contracts of, 31.

IMPLIED PROMISE:

Where F. bought land from B. and reconveyed, by way of mortgage, to secure his note for the purchase money, and afterwards, by bargain and sale and not by way of *rescission* of the trade with B., conveyed the land to W , who had purchased such note. *Held*, that there was no implied promise on the part of W. to repay to F. any part of the money he had paid on the note or for improvements on the land prior to the conveyance. *Weil* v. *Flowers*, 133.

IMPLIED PROMISE:

1. Where in an action to recover money expended by plaintiff mortgagee for the benefit of defendant mortgagor, the verified complaint alleged a certain sum to be due from defendant to plaintiff on the implied promise to repay and no answer was filed, it was proper to render a judgment by default final. *Cowles* v. *Cowles*, 272.
2. If, in such case, on the facts stated in the complaint, the law did not raise an implied promise to repay, the judgment would be erroneous and not irregular and another Judge at a subsequent term would have no right to correct or set it aside. *Ib.*

IMPOUNDING CATTLE, 418:

1. Where a town ordinance made it the duty of the town constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited the authorities from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents. *Held*, that a sale of an impounded cow, belonging to a non-resident, for the cost of feeding her while impounded, was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the word "poundage or penalty." *Aydlette* v. *Elizabeth City*, 4.
2. When the purchaser, in such case, surrendered the cow to the true owner, he cannot recover from the town authorities the amount which he bid and paid for the cow at the sale. *Ib.*

IMPRISONMENT FOR DEBT.

Imprisonment for debt being prohibited by the Constitution, a defendant cannot be arrested upon a judgment on a note. *Stewart* v. *Bryan*, 46.

INDICTMENT:

For Arson, 623.

For Assault and Battery, 584, 677.

For Assault with Intent to Commit Rape, 628.

For Burglary, 669.

For Burning Stable:

In an indictment under Sections 985 (6) of *The Code* directed against setting fire to certain kinds of buildings "whether such buildings shall then be in possession of the offender or in the possession of any other person," it is not necessary to allege that the burned building was "in possession of" some person named. *State* v. *Daniel*, 574.

For Carrying Concealed Weapon, 556.

For Compounding Felony, 606.

For Conspiracy, 650.

For Conspiracy to Procure Seduction of Unmarried Woman, 635.

For Failure to Pay Taxes, 569, 616.

For Failure to Work Public Road, 610.

For Giving Away Liquor on Election Day, 680.

For Illegal Sale of Liquor, 632.

For Injury to Personal Property, 614.

For Forcible Trespass, 586, 620.

For Forgery, 674.

For Fornication and Adultery, 682.

For Larceny, 667.

For Murder, 544, 563, 659, 684.

For Obtaining Money Under False Pretenses, 604.

For Official Negligence, 558.

For Practicing Medicine without License, 643.

For Rape, 533, 579.

For Running Division Fence, 679.

For Resisting Officer, 612.

For Seduction, 551.

For Selling Liquor on Sunday, 578.

For Trespass on Land, 546.

For Unlawfully Opening Graves, 589.

INDICTMENT, Sufficiency of:

1. Since the passage of Chapter 53, Acts of 1885, it is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and wilfully injures it nor is it material whether the property was destroyed or not. *State* v. *Sneed*, 614.
2. It is not necessary to allege in a bill of indictment for forcible trespass that the prosecutor at any time forbade the defendant to enter upon the land or that he was put in fear, and thus failed to forbid such entry, by reason of the great numbers or by the force manifested. *State* v. *Austin*, 620.
3. Under Acts 1889, Chapter 181, Section 5, making it a misdemeanor to practice medicine without first having registered and obtained a certificate, an indictment which does not charge that defendant did not register, and obtain a certificate, as required, is defective. *State* v. *Call*, 643.
4. Such indictment need not charge that defendant practiced "for fee or reward." *Ib.*
5. An indictment under Acts 1889, Chapter 181, Section 5, making it a misdemeanor to practice medicine without first having registered, and obtained a certificate, need not charge that defendant does not belong to one of certain classes which are withdrawn from the operation of the Statute by a proviso thereto. *Ib.*
6. An indictment charging three defendants with having conspired to procure sham marriages between two of them and two women is not bad for duplicity. *State* v. *Wilson*, 650.
7. Duplicity in a bill of indictment is ground only for a motion to

quash and, being cured by verdict, is not ground for a motion in arrest of judgment. *Ib.*

8. In an indictment under Sections 985 (6) of *The Code* directed against setting fire to certain kinds of buildings "whether such buildings shall then be in possession of the offender or in the possession of any other person," it is not necessary to allege that the burned building was "in possession of" some person named. *State* v. *Daniel*, 574.

9. An indictment for murder which sets out the name and county of residence of the accused, the date of the homicide, the averment "with force and arms," the county in which the homicide was committed and that the defendant feloniously, wilfully and of his malice aforethought did kill and murder the person alleged to have been killed "against the form of the Statute in such case made and provided and against the peace and dignity of the State," is sufficient under Chapter 58, Acts of 1887, and is not defective for failure to allege whether the person killed was a man or woman, or whether the mortal wound was inflicted by stabbing, shooting or killing. *State* v. *Pate*, 659.

INJUNCTION:

1. Application for an injunction against the enforcement of a town ordinance alleged to be void is a misconception of remedy, as a Court of Equity will not interpose when the plaintiff's proper remedy is a civil action at law for damages. *Scott* v. *Smith*, 94.

2. Where, in an action brought in good faith to quiet plaintiff's title and to determine the adverse claims of the defendants, an interlocutory order was issued restraining the defendants from selling the land under a deed of trust, and material issues were raised by the pleading used as affidavits, and no facts were found by the Judge on the hearing of the Rule to show cause, &c., it was error not to continue the injunction to the trial of the action. *Jones* v. *Buxton*, 285.

3. Where, in an action for trespass, plaintiff prayed for an injunction, a deed to the defendant executed after the trespass should have been considered by the Court in determining the right to the injunction. *Caldwell* v. *Manufacturing Co.*, 339.

INJURY TO CHILD:

Where a minor son of plaintiff was employed by defendant without the knowledge or consent of the father and was injured while so employed, but the injury was not due to the employer's negligence; *Held*, that there can be no recovery by the father for loss of services after and in consequence of the injury. *Williams* v. *Railway Co.*, 512.

INJURY TO PERSON, 301.

INJURY TO PERSONAL PROPERTY, 614.

INJURY RESULTING IN DEATH, Who may Sue:

A widow has no right of action against persons wrongfully causing the death of her husband, the Statute (*The Code*, Section 1498) giving a right of action alone to the personal representative of the person killed. *Howell* v. *Commissioners*, 362.

INQUISITION OF LUNACY, 297.

INSOLVENT BANK:

1. Under chapter 155, Acts of 1891, as amended by Chapter 478, Acts of 1893, requiring the State Treasurer to appoint some one to examine and report on the condition of the State banks and if it appears from such report that a bank is insolvent or in imminent danger of insolvency, to institute proceedings in the Superior Court of Wake County for winding up its affairs, and for the appointment of a receiver according to law, application for the appointment of such receiver may be made before the resident Judge or the Judge holding the Courts by assignment or exchange of the Judicial District in which Wake County is situated. *Worth* v. *Bank*, 343.
2. In such case, it can make no difference in the Treasurer's right to make such application, that the examiner did not make his report until the insolvency of the Bank was publicly known. *Ib.*
3. The Acts of 1891 (Chapter 155,) and of 1895. (Chapter 478,) do not give to the State Treasurer the exclusive right to institute proceedings for a receiver so as to take away the right of any creditor, by a general creditor's bill, to begin an action for that purpose in the Superior Court of the County where the bank is situated. *Ib.*

INSOLVENT CORPORATION, 126.

INSTRUCTIONS:

1. When the substance of a party's prayer for instruction is given in the charge by the trial Judge, it is not necessary that the exact language of the prayer should be followed. *Edwards* v *Phifer*, 388.
2. Where, in the trial of an action for damages caused by defendant's

negligence, there is no evidence tending to prove contributory negligence, the Court may instruct the jury that there was no contributory negligence. *White* v. *Railroad Co.*, 484.

3. Where, in the trial of an action, the plaintiff has produced some, or more than a *scintilla* of, evidence in support of his contention, or there is conflicting evidence, it is the province of the jury to determine its weight and it would be improper to instruct the jury that if they believe the evidence the plaintiff cannot recover. *Everett* v. *Receivers*, 519.

4. Where, in the trial of an indictment for carrying a concealed weapon, it appeared that the defendant had on no overcoat and had put his pistol, 10 or 11 inches long, in an upper outside coat pocket and that the handle and two inches of the breach were exposed to view and that when it was handed to him to take on a journey he said he did not intend to conceal it, it was error to instruct the jury that, if they believed from the evidence that any part of the pistol was concealed, that it could not be seen from the outside, they should find the defendant guilty. *State* v. *Reams*, 556.

5. Where, on the trial of an indictment for selling liquor on Sunday, a witness for the State testified that he went to the defendant's restaurant as a spy for the police officer and for the purpose of making a case against the defendant, it was not error to refuse an instruction that it would be unsafe to convict the defendant upon the unsupported testimony of such witness. *State* v. *Black*, 578.

6. In such case, it was proper to charge the jury that, if they believed the witness was a spy, they should scrutinize his testimony and, after doing so, if they believed his testimony to be true, it made no difference as to what his motive was in going to defendant's restaurant as to what his character was. *Ib.*

7. It is not error to refuse to give instructions to the jury that were not asked for at or before the close of the evidence *State* v. *Hairston*, 579.

8. A man and a woman are both guilty of abusing and carnally knowing a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. *Ib.*

9. An instruction to the jury on the trial of an indictment that they should scrutinize closely the testimony of the father and mother of defendant on account of the relationship but that, if their testimony was believed, it should have as much weight as that of other witnesses, was proper. *State* v *Apple*, 584.

10. On the trial of an indictment for assault with intent to commit rape it was not error to charge that "if the jury are satisfied beyond a reasonable doubt that the defendant laid hands upon the

prosecutrix violently and against her will, for the purpose of having sexual intercourse with her, and that, at the time he so laid hands upon her, he intended to accomplish his purpose at all hazards in defiance of and notwithstanding any resistance she might make, then the defendant was guilty of an assault with intent to commit rape although he may have subsequently abandoned his purpose." *State* v. *Williams*, 628.

INSURANCE, Conditions in Contract of, 290.

INTENT, 628:

1. In an action for the penalty imposed by Section 42 of Chapter 159, Acts of 1895, it is not necessary that the complaint should allege a wilful and corrupt intent on the part of the defendant in giving money, &c., to electors in order to be elected to office. *Epps* v. *Smith*, 157.
2. The concealed possession of a weapon about one's person and off his own premises raises the presumption of guilt which may be rebutted, and whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. *State* v. *Reams*, 556.
3. When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence. *State* v. *McLean*, 589.
4 Under Section 1 of Chapter 90, Acts of 1885, providing that any person who shall without due process of law or the consent of the next of kin of the deceased, open any grave for the purpose of removing anything interred therein, shall be guilty of a felony, the doing the forbidden act itself is conclusive as to the intent with which it was done. *Ib.*
5. It is not necessary, to constitute a violation of Section 2740 of *The Code*, that the selling or giving away of liquor on election day shall be with the intent to influence any vote or with any intent. *State* v. *Gibson*, 680.

INTERLOCUTORY ORDER:

An appeal from an order of the Court below setting aside the verdict on one of several issues and awarding a new trial thereon is premature and will be dismissed. In such case, an exception should have been noted which could have been passed upon on the appeal from the final judgment. *Benton* v. *Collins*, 66.

INTER-STATE COMMERCE, What is Not, 632.

INVALID STATUTE, 394.

ISSUES, 17:

1. A defect in the form of issues cannot be assigned as error on appeal when not excepted to below. *Robinson* v. *Sampson*, 99.
2. In the trial of an action it is only necessary to submit such issues as arise out of the pleadings *material to be tried* and such as will admit all material evidence upon the whole matter in controversy. *Cecil* v. *Henderson*, 24.
3. Where, in the trial of an action, the issues settled by the Court are such as to enable each party to have every phase of his contention presented, or if the issue submitted is the only one raised by the pleadings, this Court will not declare error either as to the form or number of the issues submitted. *Patterson* v. *Mills*, 258.
4. When the issues submitted on a trial are such as to enable the parties to present every phase of the controversy, no objection can be sustained either for those submitted or for refusing to submit other or different issues. *Coley* v. *Statesville*, 301.
5. An exception to issues submitted or for failure to submit issues tendered cannot be sustained where those submitted properly arose upon the pleadings. *James* v. *Railroad*, 530.

JOINDER OF HUSBAND IN ACTION BY WIFE, When not Necessary:

Under a reasonable construction of the Constitution and Section 1832 of *The Code*, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. *Brown* v. *Brown*, 8.

JOINT MEETING OF TWO SEPARATE OFFICIAL BODIES:

Where, the power of appointment to an office is conferred by Statute upon two or more bodies and no provision for a quorum is made, nor is it provided that they shall act separately, the rule is that all the members of all the bodies must meet together for consultation, or all must be *notified so to meet*, and thereupon, if the majority of those present constitute a majority of all the members of all the bodies, they may proceed to make the appointment. *Shennonhouse* v. *Withers*, 376.

JOURNALS OF GENERAL ASSEMBLY AS EVIDENCE, 394.

JUDGE, Charge to the Jury:

1. When the substance of a party's prayer for instruction is given in the charge by the trial Judge, it is not necessary that the exact language of the prayer should be followed. *Edwards* v. *Phifer*, 388.
2. Inasmuch as the Statute (Section 413 of *The Code*) requires that the trial Judge "shall state in plain and correct manner the evidence given in the case and declare and explain the law arising thereon," a charge to the jury, in the trial of an indictment for murder, where the evidence of guilt is conflicting, is insufficient which only defines the different degrees of murder and contains no array of the facts or instruction as to the law applicable to such facts as the jury may find to be true from the evidence. *State* v. *Groves*, 563.
3. Where a defendant on trial for a capital offence pleads "not guilty," his consent that the Judge need not read over his notes of the testimony is not a waiver of his right to have the law applied to the facts in his case as the law requires shall be done. *Ib.*

JUDGE, Discretion of:

The allowance or refusal of a motion to amend pleadings is a matter within the discretien of the trial Judge and no appeal lies therefrom. *Goodwin* v. *Fertilizer Co.*, 91.

JUDGE, Expression of Opinion by, 551.

JUDGE, Right of One to Set Aside Judgment of Another:

One Judge has no power to reverse or set aside, in whole or in part, a final order or judgment rendered by another Judge except on notice and a showing that there was on the part of the complainant mistake, inadvertence, surprise or excusable neglect by which he was injured. *Johnson* v. *Marcom*, 83.

JUDGE, Settlement of Case on Appeal by:

The settlement of a case on appeal by the trial Judge does not cure the failure to serve the case on appeal within the time fixed by law. *Barrus* v. *Railroad Company*, 504.

JUDGMENT:

1 One Judge has no power to reverse or set aside, in whole or in part, a final order or judgment rendered by another Judge except on notice and showing that there was on the part of the complainant mistake, inadvertance, surprise or excusable neglect by which he was injured. *Johnson* v. *Marcom*, 83.

2. An erroneous judgment is one entered regularly but contrary to law and can not be set aside at a subsequent term of the Court, while an irregular judgment is one entered contrary to the course and practice of the Court and may be set aside on motion if made after notice, within apt time. *Banking Co.* v. *Duke*, 110.

3. A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. *Ib.*

4. Where, in an action against the makers of a joint and several note, the complaint alleged no difference in the liability of the makers except in the prayer for judgment, and a judgment by default was entered against two of the defendants who failed to appear and answer; *Held*, that it was error, and at a subsequent term and after due notice, to amend the judgment, on motion of the defendants, by inserting after their names the words "as sureties," it not being the practice of the Courts to see that evidence of suretyship is produced and such fact inserted in the judgment in the absence of the defendants and without any averment or request on their part. *Ib.*

5. A judgment for a debt including an order for the sale of land mortgaged to secure the same, is final as to the debt at the time when rendered and not at the time when the decree confirming the sale is made. *McCaskill* v. *McKinnon*, 192

6. A payment on a judgment does not arrest the running of the Statute of Limitations *Ib.*

JUDGMENT, Affirmance of on Appeal:

1. The absence of a case on appeal does not entitle the appellee to have appeal dismissed, but, if no error appears on the face of the record proper, the judgment below will be affirmed. *Hicks* v. *Westbrook*, 131.

2. The absence of a legally settled case on appeal does not entitle the appellee to have the appeal dismissed but, where no error appears on the face of the record proper, judgment must be affirmed. *Barrus* v. *Railroad Co.*, 504.

JUDGMENT, As Evidence:

In cases where it is only sought to prove the existence or contents of a judgment it is only necessary to produce in evidence a duly authenticated copy of the judgment itself, a full copy of the proceedings in which the judgment was rendered being required only where the judgment is relied upon to establish any particular state of facts upon which it was based, or as matter of estoppel. *Rainey* v. *Hines*, 318.

JUDGMENT BY DEFAULT, Final:

1. A court has no right to enter a final judgment by default on the charge of fraud and embezzlement for collecting and appropriating money received on collaterals, where the defendant makes no appearance or defence, but only a judgment by default and enquiry, if requested by the plaintiff. *Stewart* v. *Bryan*, 46.
2. Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, and judgment by default was entered, the presumption is that the judgment was rendered on the note, as was right, and not on the charge of fraud, which the Court had no right to do *Ib.*
3. In such case, the judgment is final on the note and the cause is not retained on the docket for further action. *Ib.*
4. When the complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraud in the embezzlement of the proceeds of collaterals deposited as security for the note, and, in default of appearance and defense, judgment was rendered on the note but not on the charge of fraud, the plaintiff was not entitled to an order of arrest under Sections 291 and 447 of *The Code*, as amended by Chapter 541, Acts of 1891, since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. *Ib.*
5. Where, in an action to recover possession of land, the defendant failed to file answer or the bond required by Section 237 of *The Code*, and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under Section 390 of *The Code*, to give judgment against the defendant for possession of the land, without damages. *Jones* v. *Best*, 154.

JUDGMENT, Final, 192.

JUDGMENT IN PERSONAM:

A judgment upon a note *in personam*, taken at the same time with a decree of foreclosure of a mortgage (a judgment in *rem*), is final and creates a lien upon all the property of the judgment debtor in the county where docketed and the validity of the judgment on the debt is not affected by the judgment for sale of the land. *McCaskill* v. *Graham*, 190.

JUDGMENT, Lien of:

1. A judgment upon a note *in personam*, taken at the same time with a decree of foreclosure of a mortgage (or judgment in *rem*), is final

and creates a lien upon all the property of the judgment debtor in the county where docketed and the validity of the judgment on the debt is not affected by the judgment for sale of the land. *McCaskill* v. *Graham*, 190.

2. Where one buys land subject to a judgment lien his title is freed from the incumbrance after the lapse of ten years from the date of docketing. *Ib.*

JUDGMENT IN REM:

A judgment upon a note *in personam*, taken at the same time with a decree of foreclosure of a mortgage (a judgment in *rem*), is final and creates a lien upon all the property of the judgment debtor in the county where docketed and the validity of the judgment on the debt is not affected by the judgment for the sale of the land. *McCaskill* v. *Graham*, 190.

JUDGMENT, Irregular and Erroneous, 272.

JUDGMENT, Lien of on Allotted Homestead:

The lien of a judgment on land in which a homestead has been duly allotted does not cease upon the expiration of ten years from the date of the judgment but continues during the continuance of the homestead estate, notwithstanding a sale and conveyance of the land by the homesteader. *Bevan* v. *Ellis*, 224.

JUDICIARY, Independent Tenure of:

The Railroad Commission Act providing for the suspension, by the Governor, of a member of the Commission who becomes subject to the disqualifications prescribed in the Act, does not interfere with the independent tenure of the judiciary, the Commission being an administrative and not a judicial Court. *Caldwell* v. *Wilson*, 425.

JURISDICTION, 538, 541:

1. An objection to the jurisdiction can be made at any stage of a proceeding. *Cary* v. *Allegood*, 54.
2. Consent of parties cannot give jurisdiction where it does not attach under the Constitution and laws. *Ib.*
3. A Justice of the Peace has no jurisdiction to direct the application, by a Sheriff, of the proceeds of an execution issued by another Justice of the Peace upon the ground that the latter was null and void. *Ib.*

4. The allowance of expenditures of a collector of an estate is, under Section 1524 of *The Code*, within the original jurisdiction of the Clerk of the Superior Court and the Court at Term has no power to make an allowance to the collector for counsel fees paid by him in a litigation in which he attempted to defeat the rightful claim of the executor to a fund in his hands. *Johnson* v. *Marcom*, 83.

5. An appeal from the judgment of a Clerk of the Superior Court refusing leave to issue execution on a judgment may be heard by the resident or presiding Judge of the District at Chambers in another County. *McCaskill* v. *McKennon*, 192.

6. The Superior Court has no jurisdiction of an original motion to set aside an execution and order of sale granted by a Justice of the Peace. *Hamer* v. *McCall*, 197.

7. The Court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by otherCourts of concurrent jurisdiction; and, hence, where permanent receivers were appointed in separate proceedings by different Courts having equal authority to appoint, the test of prior jurisdiction is not the first issuing of the summons, nor the first preparation and verification of the papers, nor which receiver first took possession, but which Court was first "seized of jurisdiction," by making an order upon legal proceedings exhibited before it, as by the appointment of a temporary receiver. *Worth* v. *Bank*, 343.

8. The Superior Court has not original jurisdiction of an action by a stock-holder in an Insurance Company doing business as a building and loan association against the company, to recover an overpayment of interest on a loan when the amount sought to be recovered is less than $200 00 *Gilliam* v. *Insurance Co.*, 369.

9. An amendment to a complaint, the effect of which is to confer and not merely to *show* jurisdiction, will not be permitted; hence, where the amount sought to be recovered in an action brought in the Superior Court was not within its jurisdiction, the plaintiff cannot be allowed to amend his complaint by changing the cause of action and increasing the amount of the recovery prayed for so as to bring it within such jurisdiction. *Ib.*

JURISDICTION OF JUDGE ON APPEAL FROM CLERK OF SUPERIOR COURT:

1. Under Ch. 276, Acts of 1887, amendatory of Section 255 of *The Code*, the Judge, to whom a cause is sent by appeal or otherwise from the Clerk of a Superior Court, has full jurisdiction to hear and fully determine the cause, or to make orders therein and send it

back to the Clerk to be proceeded with by him. *Faison* v. *Williams*, 152.

2. When three of four plaintiffs in a proceeding for partition moved, upon a petition filed in the cause before the Clerk, to set aside the report of the Commissioners on the ground of newly discovered testimony and to amend the complaint by inserting an allegation averring sole seizin in themselves and that the fourth party plaintiff was not entitled to any interest in the premises, and the Clerk refused the motion, and sent the cause, on appeal, to the Judge; *Held*, that the Judge had power in his discretion to set aside the judgment for newly discovered testimony and to permit the amendment asked for. In such case, when the proceedings are remanded the appellant will have an opportunity to answer the amended complaint and to present issues of fact arising thereon. *Ibid*.

JUROR, Qualification of:

1. A juror who has a suit "pending" but not "at issue" at the term of the Court at which he has been drawn to serve, is not disqualified under Section 1728 of *The Code*. *State* v. *Smarr*, 669.
2. The requirements of the Statute as to the manner or time of drawing jurors is directory merely and. hence, an objection that the jury list was not revised when required by Statute will not be considered in the absence of proof of bad faith or corruption on the part of the officers charged with that duty or where it does not appear that the party objecting has been, in some way, prejudiced thereby. *Ib*.
3. Sections 196 and 197 of *The Code* forbid a removal of a cause from the County of the right *venue* to another unless the trial Judge shall be "satisfied" that justice demands it; and the granting or refusal of such motion, however strong the affidavits in support of or against the motion may be, and whether there be counter affidavits or not, is not reviewable. *Ib*.
4. An objection by a prisoner charged with a capital offence that the special *venire* was summoned by the Sheriff as prescribed by Section 1738 of *The Code* instead of being drawn from the jury box as prescribed by Section 1739 of *The Code*, is untenable since the latter method is purely discretionary. *Ib*.

JURY, Impeachment of Verdict of, 384.

JURY, Misconduct of:

The granting or refusing a new trial rests in the discretion of the trial Judge when the circumstances are such as merely to put suspicion on a verdict by showing not that there was, but that there might have been undue influence brought to bear on the jury because there was opportunity; but, where the fact appears that undue influence was brought to bear on the jury or that they heard other evidence than that offered on the trial, this Court on appeal will, as a matter of law, grant a new trial whether the prisoner be convicted or acquitted, since there has been no trial in contemplation of law. *State* v. *Perry*, 533.

JURY, Province of, 484.

JURY OF VIEW.

1. In the absence of constitutional or statutory prohibition, it is in the discretion of a trial Judge to permit the jury to visit the scene of the *res gestae*, in criminal and civil cases, whenever such visit appears important for the elucidation of the evidence but such visit must be carefully guarded to prevent conversation with third parties and no evidence must be taken. *State* v. *Perry*, 533.
2. Where a jury, after the close of the evidence, visited the scene of the alleged crime and made enquiry of a passer by as to the identity of a certain house whose distance from the alleged *locus* was material, their conduct in thus "eliciting other evidence than that offered on the trial" is ground for new trial whether their visit to the spot was by or without leave of the Court. *Ib.*

JUSTICE OF THE PEACE:

1. A Justice of the Peace has no jurisdiction to direct the application, by a Sheriff, of the proceeds of an execution issued by another Justice of the Peace upon the ground that the latter was null and void. *Cary* v. *Allegood*, 54.
2. An execution or order of sale issued by a Justice of the Peace cannot be set aside by an original motion in the Superior Court. *Hamer* v. *McCall*, 197.

JUSTICE OF THE PEACE, Appeal from Judgment of, 364.

LACHES, 501.

LANDLORD'S LIEN, 70.

LANDLORD AND TENANT, 209.

A tenant being estopped from denying that the party from whom he leased is his landlord and entitled to the rents, cannot escape the landlord's lien by claiming his personal property exemption out of the crops. *Hamer* v. *McCall*, 196.

LEASE OF BUILDING:

1. The law, in leases, does not imply any warranty as to the quality or condition of the leased premises. *Gaither* v. *Generator Co.*, 384.
2. Where, in the trial of an action for the rental of buildings which the lessee had abandoned for the alleged reason that, on account of the rising of water in the basement, the condition of the premises endangered the health of defendant's agents and employees, and that plaintiff was aware of but concealed the defect from defendant's agent, who contracted the lease, the trial Judge instructed the Jury that, if they should not believe that the condition of the basement became a nuisance, they should find for the plaintiff; *Held*, that such instruction was not objectionable as including the submission of a question of law to the jury when it was preceded in the charge by the statement that, if the basement became wet and its condition injurious to the health of the occupants of the building, then it was in law, a nuisance. *Ib.*

LEASE ON INSTALMENT PLAN:

A written contract although called a "lease on the instalment plan" and not providing that title shall pass upon the completion of the payment of the instalments, may constitute a "conditional sale" of an article where the same has been delivered upon a payment in advance and an agreement to pay a certain sum each month for a series of months. *Manufacturing Co.* v. *Gray*, 168.

LEGAL ESTATE NECESSARY TO SUPPORT ACTION FOR RECOVERY OF LAND, 322.

LEGAL SETTLEMENT OF PAUPERS, 295.

LEGISLATIVE OFFICE:

One who accepts an office created by legislative enactment takes it with notice of the power of the legislature to abolish it and subject to all the provisions of the act creating the office. *Ward* v. *Elizabeth City*, 1.

LEGISLATIVE POWER, 1, 172, 418, 425, 643.

LEGISLATIVE POWER TO CHANGE REMEDY:

The Legislature may change the remedy and the Statute of Limitations which applies to the remedy, by extending or shortening the time for beginning an action; provided, in the latter case, a reasonable time is given for the commencement of the action before the Statute works a bar. *Culbreth* v. *Downing*, 205.

LESSEE, Burning of Building by:

An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within Section 1761 of *The Code*, which declares that any tenant who shall injure any tenant house of his landlord by burning, or in any other manner, shall be guilty of a misdemeanor *State* v. *Graham*, 623.

LIEN, Equitable, 318.

LIEN, For Taxes, 38.

LIEN, For Work and Labor or for Material Furnished:

The separate estate of a married woman is not subject to a lien for labor done or materials furnished for its improvement under a verbal contract of herself and husband. *Matthews* v. *Borders*, 387.

LIEN OF JUDGMENT:

1. A judgment upon a note *in personam*, taken at the same time with a decree of foreclosure of a mortgage (or judgment in *rem*), is final and creates a lien upon all the property of the judgment debtor in the county where docketed, and the validity of the judgment on the debt is not affected by the judgment for sale of the land. *McCaskill* v. *Graham*, 190.
2. Where one buys land subject to a judgment lien his title is freed from the incumbrance after the lapse of ten years from the date of docketing. *Ib.*

LIEN OF MORTGAGEE AS LANDLORD FOR ADVANCES AFTER ATTORNMENT BY MORTGAGOR.

After forfeiture, a mortgagee can, by contract, become landlord of the mortgagor so as to avail himself of the landlord's lien which, though such contract be oral and unregistered, has priority over the subsequent liens for supplies furnished by third parties who, by the registration of the mortgage, are fixed with notice of the mortgagor's default and the mortgagee's right of entry. (CLARK, J., dissents *arguendo* in which MONTGOMERY, J., concurs.) *Ford* v. *Green*, 70.

LIABILITY OF COMMON CARRIERS FOR DAMAGED GOODS. (SEE "COMMON CARRIERS.")

LIABILITY OF PURCHASER OF RAILROAD UNDER SALE UNDER SECOND MORTGAGE, 523.

LIFE ESTATE.

Where land was conveyed to A. for life, with limitations over in the event of the happening of certain contingencies, but with full power in A. to dispose of the same with the written permission of her husband; *Held*, that A. and her husband can convey a good title in fee to a purchaser. *Wright* v. *Westbrook*, 155.

LIS PENDENS, Discontinuance of, 76.

LIMITATION, in Deed:

Where land was conveyed to A. for life, with limitations over in the event of the happening of certain contingencies but with full power in A. to dispose of the same with the written permission of her husband; *Held*, that A. and her husband can convey a good title in fee to a purchaser. *Wright* v. *Westbrook*, 155.

LIMITATION OF ACTIONS:

1. The Legislature may change the remedy and the Statute of Limitations which applies to the remedy, by extending or shortening the time for beginning an action; provided, in the latter case, a reasonable time is given for the commencement of the action before the Statute works a bar. *Culbreth v. Downing*, 205.
2. The "reasonable time" for beginning an action on a cause, the statutory limitation of which has been shortened by the Legislature, is held to be "the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute." *Ib.*

LIMITATIONS, Statute of, 190.

1. When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. *Parker* v. *Harden*, 57.
2. In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Ib*
3. When the bar of the statute is complete before the death of the party against whom a cause of action existed, Section 164 of *The Code*, has no application. *Ib.*
4. Where, in an action to recover the amount due on a note and to foreclose the mortgage securing the same, judgment was rendered

on the debt at September Term, 1886, of a Superior Court and in the judgment an order was made directing the sale of the land which sale was reported to and confirmed at June Term, 1887, of the Court and the proceeds were credited on the judgment at the latter date; *Held*, that the Statute of Limitations began to run at the date of the money judgment in September, 1886, and not from the date of the confirmation of the sale. *McCaskill* v. *McKinnon*, 192.

5. A payment on a judgment does not arrest the running of the Statute of Limitations. *Ib.*
6. An action begun in July, 1894, for the recovery of invalid taxes paid in 1890 and several years previous, is barred by *The Code*, Section 155. *Hatwood* v. *Fayetteville*, 207.
7. The lien of a judgment on land in which a homestead has been duly allotted does not cease upon the expiration of ten years from the date of the judgment but continues during the continuance of the homestead estate, notwithstanding a sale and conveyance of the land by the homesteader. *Bevan* v. *Ellis*, 224.
8. Open and continuous adverse possession of land for twenty years will give title in fee to the possessor as against all *persons* not under disability. *Walden* v. *Ray*, 237.
9. Thirty years adverse possession of land will bar an action by the State and such possession need not be continuous nor need there be any connection between the tenants. *Ib.*
10. Although Section 172 of *The Code* renders invalid a new promise to take the case out of the bar of the Statute of Limitations unless the new promise is in writing and signed by the party to be charged therewith, yet, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the Statute of Limitations, this Court, in the exercise of its equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. *Cecil* v. *Henderson*, 244.
11. The Statute of Limitations begins to run against a cause of action as soon as the plaintiff, being then under no disability, is at liberty to sue. *Eller* v. *Church*, 269.

LUNATIC:

1. A marriage with a declared lunatic is alsolutely void *ab initio*. *Sims* v. *Sims*, 297.
2. A marriage void on account of lunacy cannot be cured by cohabitation after restoration; being a nullity, such marriage could only

be remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground or by a new marriage. *Ib.*

3. An action for divorce may be maintained by a guardian of a lunatic in the name of his ward. *Ib.*
4. The appointment of a guardian for a lunatic is valid until the proceedings and orders under the inquisition are reversed. *Ib.*
5. *Ex parte* proceedings to have a lunatic declared sane, brought without service of notice upon the guardian of such lunatic, are a nullity as well as an order made in such proceedings removing the guardian without notice. (Section 217 (3) of *The Code.*) *Ib.*
6. The report of a jury in an inquisition of lunacy need not be formally "confirmed" by the Clerk of the Superior Court, the Statute only requiring it to be "filed and recorded." *Ib.*

LUNATICS, Contracts of:

1. Idiots, lunatics and persons otherwise *non compos mentis*, being incompetent to enter into any valid contract, every person who deals with them, knowing their incapacity, is deemed to perpetrate fraud upon them and their rights, and equity will set aside such contracts upon the ground of such fraud, charging the lunatic with only such benefits as he actually received from the transaction. *Creekmore* v. *Baxter*, 31.
2. Where, in the trial of an action to recover land which had been sold under a mortgage executed by a person alleged to be *non compos mentis*, the jury found that the mortgagor was a lunatic at the time of the transaction and that the mortgagee had knowledge of the incapacity of the grantor, an additional finding in response to an issue submitted at the request of the defendant, that no actual fraud was practiced by the mortgagee upon the mortgagor was not inconsistent with the other findings, no actual fraud having been charged in the pleadings, *Ib.*

MAJORITY VOTE OF JOINT MEETING OF TWO SEPARATE OFFICIAL BODIES, 376.

MANDAMUS, 350:

When a judgment has been obtained against a County or other Municipal Corporation, it is not necessary that notice as required in certain cases by Section 757 of *The Code* should be given before bringing an action for mandamus to compel the payment of the judgment. *Nicholson* v. *Commissioners*, 27.

MARGINAL REFERENCES, Printing in Record, 506.

MARRIAGE:

1. A marriage with a declared lunatic is absolutely void *ab initio.*

Sims v. *Sims*, 297.

2. A marriage void on account of lunacy cannot be cured by cohabitation after restoration; being a nullity, such marriage could only be remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground or by a new marriage *Ib.*
3. An action for divorce may be maintained by a guardian of a lunatic in the name of his ward. *Ib.*

MARRIAGE, Validity of:

1. While consent is essential to marriage in this State it is not the only essential but it must be acknowledged in the manner and before some person prescribed by Section 1812 of *The Code. State* v. *Wilson*, 650.
2. A marriage pretendedly celebrated before an unauthorized person being a nullity and not capable of being legalized by consent, a conspiracy to procure sexual intercourse with a woman through such pretended marriage is an indictable offence *Ib.*

MARRIED WOMAN:

1. The contract of a married woman, made for the support of herself and family, is valid and her separate personal estate is liable therefor *Bazemore* v. *Mountain*, 59.
2. A husband may be the agent of his wife in the management of her separate estate and for his contracts, as such agent, made for the support of herself and family, her separate personal estate is liable. *Ib.*
3. Where, in the trial of an action to subject the separate estate of a married woman to the payment of a debt alleged to have been contracted for the support of her family, it appeared that the wife owned farm lands in her own name, that her husband contributed nothing to the support of the family; that her only means of support was the rental from her lands which she was unable to rent without furnishing supplies to the tenants; that she had no supplies and could not furnish them except by contracting with some one else to do so and that she contracted with the plaintiff to furnish such supplies; *Held*, that such contract was for the benefit of the wife and family and necessary for their support and her separate personal estate is liable therefor. *Ib.*
4. It is the duty of an officer, when taking the privy examination of a married woman as to her voluntary execution of an instrument, to explain the same to her and see that the provisions of the Statute are strictly complied with; otherwise, such examination is valid. *McCaskill* v. *McKinnon*, 214.

5. A married woman whose husband was threatened with the sale of his own land under mortgage, consented to sell and convey her own land to the mortgagee, in settlement of the mortgage upon her husband's land of which she was to become the owner. The deed by which she conveyed her land described it as her own land, and the recited consideration was applied without her knowledge to the credit of a debt of her husband other than that secured by the mortgage. Subsequently, the mortgagee sold her husband's land and procured it to be bid in for the wife and conveyed to her and attempted to take a reconveyance by way of mortgage for the original debt for which it was mortgaged and another debt owed by the husband. The mortgage was invalid by reason of the want of a privy examination of the wife as to her voluntary execution of the same. *Held*, that the creditor has no equity to have his debt declared a lien upon the land, since the wife had bought it with her own separate estate and had not authorized its value to be applied otherwise than to the satisfaction of the mortgage on the land which she so bought. *Ib.*

6. Where husband and wife contracted for the purchase of a lot from C and it was virtually agreed between all parties that the deed should be made to the wife and deposited by the grantor with plaintiff as collateral security for a loan of $1100 to be used in building a house on the lot, and the deed was so made and deposited and the money was so lent and used; *Held*, That the transaction constituted a parol declaration of trust accompanying the transmission of title to the wife who took it subject to the trust which Equity will enforce in plaintiff's favor. *Bank* v. *Fries*, 241.

7. In such case, the wife is not entitled to a decree for the delivery of the deed to her until she "does equity" by paying the loan made for her benefit. *Ib.*

8. The separate estate of a married moman is not subject to a lien for labor done or materials furnished for its improvement under a verbal contract of herself and husband. *Weathers* v. *Borders*, 387.

MAYOR AND COMMISSIONERS OF TOWN, Official Acts:

1. At a meeting of the Board of Commissioners of a town, at which the Mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within sixty days notice, the bodies buried in such lots should be removed to the free part of such cemetery. Subsequently, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the Mayor said: "The way is open; go ahead and remove them;" *Held*, that the Mayor was

individually guilty of counseling, procuring and commanding an act within the meaning of Section 977 of *The Code*, the committing of which afterwards was a felony. *State* v. *McLean*, 589.

2. In such case, the act of the Mayor and Commissioners was outside of their official jurisdiction and hence they were individually liable to indictment for commanding and procuring persons to commit a felony. *Ib.*
3. In such case the Mayor and Commissionsrs, acting outside of their jurisdiction, were bound to know the requirements of the Statute and could not be heard to say that they acted in good faith and were honestly mistaken in the scope of their official power. *Ib.*

MEASURE OF DAMAGES, 135:

1. In the trial of an action for damages for injuries resulting in the death of plaintiff's intestate through alleged negligence of defendant, the true measure of damages is the present value of the net income of the deceased, to be ascertained by deducting the cost of his living and expenditures from his gross income, based upon his life expectancy, and in such calculation it is proper for the jury to consider the health and habits of the deceased at the time of his death. *Coley* v. *Statesville*, 301.
2. The mortuary tables contained in Section 1352 of *The Code*, being the provisions of a public Act, are competent without being specially put in evidence on a trial of an issue as to the *quantum* of damages for injuries resulting in the death of plaintiff's intestate. *Ib.*

MECHANIC'S LIEN:

The separate estate of a married woman is not subject to a lien for labor done or materials furnished for its improvement under a verbal contract of herself and husband. *Weathers* v. *Borders*, 387.

MILL LOGS:

The term "mill logs" or "saw logs" does not include "standing timber", in the meaning of Section 1, Chapter 173, Acts of 1895, which makes it unlawful to sell or purchase mill logs in quantities of 1,000 feet or more without inspection and measurement by a sworn inspector. *State* v. *Addington*, 538.

MISJOINDER, 198.

MONOPOLY, 643.

MORTGAGE. Foreclosure of:

1. A mortgage to secure a debt payable in instalments can be foreclosed before the maturity of the last installment if there is a provision that, upon default in any installment, all shall become due and the powers of sale may be exercised. *Barbee* v. *Scroggins*, 135.
2. A mortgage on realty and personalty to secure a debt payable in instalments provided that, upon the payment of instalments amouting to $350, the personalty should be released but that, in default in payment of one of the instalments, all should become due and the mortgagee might take possession and sell. The mortgagor being in default, the mortgagee on the 6th of March, instituted an action for the possession of the personal property which was on that day seized by the sheriff and three days thereafter was delivered to the plaintiff. On the 10th of March the defendant, mortgagor, tendered to the plaintiff an amount which, added to the intalments paid, equalled $350 and interest and cost of the proceeding which, being refused, was deposited with the Clerk of the Court for benefit of the plaintiff. *Held*, that, upon such payment into Court, the mortgage on the personalty was *eo instanti* released and the plaintiff should have discontinued his action. *Ib.*

MORTGAGE, Judgment of Foreclosure of, 190.

MORTGAGE VOID AS TO MARRIED WOMAN, 214.

MORTGAGE:

A stockholder of an insolvent Building and Loan Association, who was also a borrower of its money on mortgage, is not entitled to have the excess of the proceeds of the sale of his mortgaged property, over the mortgage debt, paid to him, when his *pro rata* share of the deficiency in the assets of the concern is equal to such excess. *Meares* v. *Davis*, 126.

MORTGAGE BY LUNATIC, 31.

MORTGAGE, Execution of by Married Woman, 214.

MORTGAGOR AND MORTGAGEE, 148:

1. When a transaction between parties occupying a fiduciary relation such as mortgagor and mortgagee, is impeached, there is a presumption of fraud, and the burden of proving the dealings to have been fair, *bona fide*, and without undue influence arising out of such relation, rests upon the party occupying the position of advantage. *Hines* v. *Outlaw*, 51.

2. Where a lessor of land mortgaged it to the lessee who surrendered it upon the termination of the lease, without having cultivated and improved it, as required by the lease, and the lessor made no claim for damages at the time, but, in an action for the foreclosure of the mortgage, set up such damages as a counter-claim; *Held*, that a presumption of undue influence arose from the relation of mortgagor and mortgagee, which put upon the mortgagee the burden of proving that the land was accepted at the end of the lease as a compliance with its terms, and that no undue influence, arising out of the fiduciary relation, was used to induce such acceptance. *Ib.*

3. After forfeiture, a mortgagee can, by contract, become landlord of the mortgagor so as to avail himself of the landlord's lien which, though such contract be oral and unregistered, has priority over the subsequent liens for supplies furnished by third parties who, by the registration of the mortgage, are fixed with notice of the mortgagor's default and the mortgagee's right to entry. (CLARK, J., dissents *arguendo* in which MONTGOMERY, J., concurs.) *Ford* v. *Green*, 70.

4. Where F. bought land from B. and reconveyed, by way of mortgage, to secure his note for the purchase money, and afterwards, by bargain and sale and not by way of *rescission* of the trade with B., conveyed the land to W., who had purchased such note. *Held*, that there was no implied promise on the part of W. to repay to F. any part of the money he had paid on the note or for improvements on the land prior to the conveyance *Weil* v. *Flowers*, 133.

5. The principal of constructive notice arises out of the duty of an intending purchaser of land to reasonably and in common prudence see that his vendor has, *prima facie*, a good title; and while, because of such duty, he is affected with notice of the provisions of such deeds and other documents as are necessary to show the vendor's title, yet when he finds upon record a deed from his vendor from the former owner conveying an absolute estate in the land, he is not affected with notice of the provisions of the grantor's will recorded in the Clerk's office executed prior to the deed and devising the land to the grantee in such deed subject to a charge *Allen* v. *Allen*, 328.

6. A mortgagor in possession of the mortgaged property with the consent of the mortgagee, after the day of payment has passed, is the owner of equity of redemption only but is liable for damages done to others in the use and enjoyment of the property. *James* v. *Railroad Co.*, 523.

7. A purchaser at a sale of property under a second mortgage subject to a first mortgage acquires only the equity of redemption but the

mortgagor is not released from liability for the debt secured by the latter. *Ib.*

MORTGAGOR OF STOCK OF GOODS LEFT IN POSSESSION:

One who makes a deed of trust for the purpose of securing the purchase price of a stock of goods and is allowed to remain in possession to conduct the business until default in specific payments, may give a valid title to any article included in the trust deed before his default and surrender of the goods to the trustee. *Merritt* v. *Kitchin*, 148.

MOTION IN SUPREME COURT FOR NEW TRIAL. (See "Practice.")

MOTION TO RECALL EXECUTION FROM SUPREME COURT, 480.

MUNICIPAL CORPORATION:

1. The General Assembly may, at its discretion, abolish municipal as well as other corporations. *Ward* v. *Elizabeth City*, 1.
2. Where a town ordinance made it the duty of the town Constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents. *Held*, that a sale of an impounded cow, belonging to a non-resident, for the cost of feeding her while impounded was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the words "poundage or penalty." *Aydlett* v. *Elizabeth City*, 4.
3. Under Section 14 of Article 7 of the Constitution providing that the General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of that article (except sections 7, 9 and 13) and substitute others in their stead, all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the Legislature; and hence. *Harris* v *Wright*, 172.
4. Chapter 150. Acts of 1897, amending the charter of the City of Wilmington and providing for the election of one alderman only for each ward and the appointment by the Governor of the State of one alderman for each ward of said city, is constitutional and valid. *Ib.*
5. The delegation to the Governor of the State of the power of appointing a portion of the aldermen of a city is within the scope of the power entrusted to the discretion of the Legislature by Section 14, Article 7, of the Constitution. *Ib.*

6 The use of a street for laying pipes, &c., in furnishing water, lights, &c., does not impose any additional servitude beyond those reasonably included in the dedication of all streets. *Smith* v. *City of Goldsboro*, 350.

7. Where plaintiff, while owner of lands adjacent to a City, platted and divided the same into "lots" and "streets" and sold all the lots to purchasers but made no conveyance of the streets, and subsequently the corporate limits of the City were extended so as to include the lands; *Held*, that the plaintiff is entitled to no damages against the City for using the streets to fulfill its duty to the purchasers of the lots in furnishing them water and lights, such use not creating any additional servitude not contemplated by their dedication. *Ib.*

MUNICIPAL CORPORATION, Boundaries:

Where the charter of a town provided that its corporate limits should be "one fourth of a mile East, West, North and South from the centre of the town which centre is the site of the brick building formerly known as the Court House, and shall run with the four cardinal points of the compass;" *Held*, that the boundary is a square whose sides run due East and West, North and South through five fixed points one fourth of a mile East, West, North and South from the designated centre. *State* v. *Rainey*, 612.

MUNICIPAL CORPORATION, Enforcement of Judgment Against:

When a judgment has been obtained against a County or other Municipal Corporation, it is not necessary that notice as required in certain cases by Section 757 of *The Code* should be given before bringing an action for mandamus to compel the payment of the judgment. *Nicholson* v. *Commissioners*, 27.

MUNICIPAL BODY, Action by Majority Valid:

It is not necessary that one who claims an office shall make a demand upon the occupant for its surrender before bringing his action to recover it, especially when the incumbent claims the right to the office and its emoluments. *Shennonhouse* v. *Withers*, 376.

MUNICIPAL BONDS:

1. Section 14, Article 2, of the Constitution providing that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each

house of the General Assembly and passed three several readings which readings shall have been on three different days, and agreed to by each House respectively, and unless the *yeas and nays* on the second and third readings of the bill shall have been entered on the "Journal", is mandatory. *Commissioners* v. *Snuggs*, 394.

2. It is incumbent upon the purchasers of State, County and municipal bonds to ascertain whether the authority to issue them has been granted according to the requirements of the Constitution. *Ib.*

MUNICIPALITY, Liability of for Damages:

1. When the ordinances of a municipality authorize the arrest by its policemen, without warrant, of intoxicated persons on the street and suitable policemen have been appointed the City incurs no liability for the arrest and confinement of such persons until fit for trial or sober enough to give bail. *Coley* v. *Statesville*, 301.
2. A municipality is required to exercise ordinary care in procuring necessaries for prisoners and supervising its subordinates and is liable only for failure to properly construct the prison or to furnish it so as to afford reasonable comfort and protection from suffering and injuries to health. *Ib.*
3. A municipality is not liable in damages for the negligence or mistake of its policemen who arrest, without warrant, persons engaged in violating its ordinances. *Ib.*
4. If a municipality has provided for prisoners arrested for violation of its ordinances a prison house reasonably comfortable and supplied to those in charge of it those things reasonably essential to prevent bodily suffering and disease, it is not liable for injuries resulting to a prisoner from the negligence of policemen or keeper of the prison in failing to make use of the means and appliances so furnished, unless the municipal authorities had, after notice of such negligence, failed to remedy or prevent the same. *Ib.*
5. The knowledge of a Chief of Police of a City concerning the defective construction or equipment of its prison is not such notice as will make the City liable for injuries resulting from such defects unless such knowledge has been communicated to the authorities or unless the authorities had failed and neglected to inspect the prison. *Ib.*

MURDER. (See "Evidence," "Trial," "Self Defence," &c.)

NEGLIGENCE, 484:

1. A municipality is required to exercise ordinary care in procuring necessaries for prisoners and supervising its subordinates and is

liable only for failure to properly construct the prison or to furnish it so as to afford reasonable comfort and protection from suffering and injuries to health. *Coley* v. *Statesville*, 301.

2. A municipality is not liable in damages for the negligence or mistake of its policemen who arrest, without warrant, persons engaged in violating its ordinances. *Ib.*

3. If a municipality has provided for prisoners arrested for violation of its ordinances a prison house reasonably comfortable and supplied to those in charge of it those things reasonably essential to prevent bodily suffering and disease, it is not liable for injuries resulting to a prisoner from the negligence of policemen or keeper of the prison in failing to make use of the means and appliances so furnished, unless the municipal authorities had, after notice of such negligence, failed to remedy or prevent the same. *Ib.*

4. The fact that a switch was negligently left open whereby an accident was caused to a passing train is not evidence of a defect in the roadbed for failure to keep which in safe condition a person thereby injured can recover damages from the Company. *Pleasants* v. *Railroad Co.*, 492.

5. Where, in the trial of an action for damages for an injury resulting from the negligence of a Railroad Company, it appeared that a conductor of a freight train had been employed as such only three or four weeks and that he negligently left open a switch to a side track on which a section of his train was standing and gave the "all right" signal to a passing train on the main track, in consequence of which a collision occurred; *Held*, that such a presumption of negligence in the employment of an incompetent servant was raised against the Company by such facts as to warrant the submission of an issue as to such negligence. *Ib.*

6. Where the rules of a Railroad Company required the employees of a side-tracked train to close the switch after getting upon the side track and, upon the approach of a train on the main track, to give the "go ahead" or "all right" signal, and also forbade a train passing on the main track to go ahead until the requisite signal was given; *Held*, in the trial of an action for damages for an injury resulting from the negligence of defendant's servant in giving the "go ahead" signal when the switch was open, that it was error to charge that "it being admitted that the switch was capable of bearing a signal light which would have showed red where the track was unsafe, it was the duty of the Company to use such signal light upon the switch." *Ib.*

7. It is not error to charge that plaintiff cannot recover unless a locomotive engineer blew a whistle negligently, wantonly or maliciously, for the purpose of frightening plaintiff's horses, inas-

much as the word "negligently" is used in such a connection as to clearly import such a degree of negligence as would be nearly akin to wantonness or malice. *Everett* v. *Receivers*, 519.

NEGOTIABLE INSTRUMENTS, 122.

NEW CORPORATION CREATED BY SALE OF OLD CORPORATION FRANCHISES:

1. The sale and conveyance of the property and franchises of the Western North Carolina Railroad Company made by a special Master to the Southern Railway Co., a foreign corporation, under a decree of foreclosure of a second mortgage, subject to an existing first mortgage, did not *ipso facto*, under Sections 697 and 698 of *The Code* make the purchaser a domestic corporation, nor did such sale and purchase make the Western North Carolina Railroad an integral part of the Southern Railway corporation. *James* v. *Railroad Co*, 523.
2. In order that the sale of the franchise and property of a corporation under mortgage shall have the effect of a dissolution of such corporation as provided in section 697 of *The Code*, another corporation must be provided, as contemplated in Section 1936 of *The Code*, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation. *Ib.*
3. It was neither the purpose nor effect of Sections 697 and 698 of *The Code* to create a foreign corporation in this State. *Ib.*

NEW PROMISE:

Although Section 172 of *The Code* renders invalid a new promise to take the case out of the bar of the Statute of Limitations unless the new promise is in writing and signed by the party to be charged therewith, yet, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the Statute of Limitations, this Court, in the exercise of its equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. *Cecil* v. *Henderson*, 244.

NEW TRIAL.

1. The granting or refusing a new trial rests in the discretion of the trial Judge when the circumstances are such as merely to put suspicion on a verdict by showing not that there was, but that there

might have been undue influence brought to bear on the jury because there was opportunity; but where the fact appears that undue influence was brought to bear on the jury or that they heard other evidence than that offered on the trial, this Court on appeal will, as a matter of law, grant a new trial whether the prisoner be convicted or acquitted, since there has been no trial in contemplation of law. *State* v. *Perry*, 533.

2 Where a jury, after the close of the evidence, visited the scene of the alleged crime and made enquiry of a passer by as to the identity of a certain house whose distance from the alleged *locus* was material, their conduct in thus "eliciting other evidence than that offered on the trial" is ground for a new trial whether their visit to the spot was by or without leave of the Court. *Ib.*

NEWLY DISCOVERED TESTIMONY, Motion for New Trial for, 498.

NOTICE, 76, 115.

NOTICE OF APPEAL FROM JUDGMENT OF JUSTICE OF THE PEACE, 364.

NOTICE TO CLIENT IS NOTICE TO ATTORNEY, 115.

NOTICE, Constructive, 224, 328.

NOTICE OF MOTION IN SUPREME COURT, 498.

NOTICE UNDER SECTION 757 OF THE CODE, 27.

OFFICE:

It is competent for the Legislature, in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor the right to suspend, the incumbent of the office. *Caldwell* v. *Wilson*, 425.

OFFICE, Abolition of:

One who accepts an office created by legislative enactment takes it with notice of the power of the Legislature to abolish it and subject to all the provisions of the Act creating the office. *Ward* v. *Elizabeth City*, 1.

OFFICE, Election to Fill, 376.

OFFICER:

One who accepts an office created by legislative enactment takes it with notice of the power of the Legislature to abolish it and subject to all the provisions of the Act creating the office. *Ward* v. *Elizabeth City*, 1.

OFFICER TAKING PRIVY EXAMINATION OF MARRIED WOMAN, Duty of:

It is the duty of an officer, when taking the privy examination of a married woman as to her voluntary execution of an instrument, to explain the same to her and to see that the provisions of the Statute are strictly complied with; otherwise such examination is invalid. *McCaskill* v. *McKinnon*, 214.

OFFICIAL ACTS, 589.

OPENING GRAVES, Indictment for, 589.

OPINION, Expression of by Trial Judge, What is not, 551.

ORDER OF COMMISSIONERS LAYING OUT PUBLIC ROADS:

The judgment of a Board of Commissioners ordering the laying out of a public road is final until reversed, is binding upon all citizens of a county and cannot be collaterally attacked. *State* v. *Joyce*, 610.

ORDER TO PRODUCE NOTE ON TRIAL, 115.

ORDINANCE OF TOWN:

1. Where a town ordinance made it the duty of the town constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited the authorities from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents. *Held*, that a sale of an impounded cow, belonging to a non-resident, for the cost of feeding her while impounded, was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the word "poundage or penalty." *Aydlette* v. *Elizabeth City*, 4.

PAROL TESTIMONY:

While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to *find* but not to *make* a corner. *Holmes* v. *Valley Co.*, 410.

PAROL EVIDENCE, Inadmissible When, 366.

PAROL TRUST, 241.

PARTIES:

Under a reasonable construction of the Constitution and Section 1832 of *The Code*, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. (Furches, J., dissenting.) *Brown* v. *Brown*, 8.

PARTIES, 106, 122:

1. The owner of a note endorsed by the payees for the accommodation of the maker may sue any one of several endorsers without joining the maker or any other endorser. *Bank* v. *Carr*, 113.
2. Where, in a proceeding to foreclose a mortgage, a person who claimed under a deed antedating the mortgage but not registered until after the commencement of the action, was made a party, the rights of such person were not affected by the fact that an heir of a deceased co-grantee in such deed was not also made a party and an exception to the proceeding on that ground is untenable. *Patterson* v. *Mills*, 258.

PATENT AMBIGUITY, 148.

PAUPERS, Settlement of and Liability of County for Support:

1. The liability of a County for the support of a pauper is determined by his "legal settlement" which is acquired by one year's continuous residence in the county and continues until a new one is acquired *Commissioners* v. *Commissioners*, 295.
2. Where a pauper, temporarily absent from the County where he has a "legal settlement," is so disabled as to require immediate medical services and is furnished by the authorities of another County with such attention and board, the latter is entitled to recover the expenses thereof from the County where the pauper has his settlement. *Ib.*

PENALTY, Action for:

1. In an action for the penalty imposed by Section 42 of Chapter 159, Acts of 1895, it is not necessary that the complaint should allege a wilful and corrupt intent on the part of the defendant in giving money, &c., to electors in order to be elected to office. *Epps* v. *Smith*, 157.
2. The repeal by Section 42, Chapter 185, Acts of 1897, of the penalty

imposed by the Act of 1895, subsequent to the commencement of the action for such penalty, did not destroy the plaintiff's cause of action (Section 3764 of *The Code*). *Ib.*

PERSONAL PROPERTY, Injury to:

1. A promissory note or due bill being an "evidence of debt" and embraced in the term "personal property," (Section 3765 (6) of *The Code*, the wanton and wilful injury to or destruction of it is indictable under Section 1082 of *The Code*, as amended by Chapter 53, Acts of 1885. *State* v. *Sneed*, 614.
2. Since the passage of Chapter 53, Acts of 1885, it is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and wilfully injures it nor is it material whether the property was destroyed or not *Ib.*

PHYSICIANS, Practicing without License:

1. The Legislature has an unquestioned right to require an examination and certificate as to the competency of persons desiring to practice medicine or to exercise other callings affecting the public and requiring skill and proficiency. *State* v. *Call*, 643.
2. The fact that a Statute, requiring such examination and certificate, exempts from its requirements physicians already practicing in the State at the date of its passage does not make the Statute invalid as creating a monopoly or conferring special privileges, since it is only the exercise of the police power to protect the public from impostors and incompetents. *Ib.*
3. Nor does such Statute violate the Fourteenth Amendment of the Constitution of the United States prohibiting any State from denying to any person the equal protection of the laws, since such amendment does not restrict the powers of the State when the Statute applies equally to all persons in the same class, and the State is usually the judge of the classification. *Ib.*
4. Section 5 of Chapter 181, Acts of 1889, making it a misdemeanor to practice medicine without first having registered and obtained a certificate from the Clerk of the Superior Court, is not in conflict with and hence does not repeal Section 2 of Chapter 117, Acts of 1885, making it a misdemeanor to practice medicine for fee or reward without first having obtained a license from the Board of Examiners. *Ib.*

PARENT, Action by for Loss of Services of Child:

Where a minor son of plaintiff was employed by defendant without the knowledge or consent of the father and was injured while so employed, but the injury was not due to the employer's negligence; *Held*, that there can be no recovery by the father for loss of services after and in consequence of the injury. *Williams* v. *Railway Co.*, 512.

PAROL TESTIMONY:

A description of land contained in a contract for its sale was "A certain tract or parcel of land lying between P's. land and C's. Creek and the old mill land." *Held*, that such description was not too vague indefinite to be explained by parol testimony fitting the description to the land. *Sherman* v *Simpson*, 129.

PLEADING, 118:

1. Where, in an action for the alleged conversion of money, the complaint did not state that the funds received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under Section 273 of *The Code*, conforming the complaint to the evidence. *Parker* v. *Harden*, 57.
2. In an action for the penalty imposed by Section 42 of Chapter 159, Acts of 1895, it is not necessary that the complaint should allege a wilful and corrupt intent on the part of the defendant in giving money, &c , to electors in order to be elected to office. *Epps* v. *Smith*, 157.
3. Where defendant in an action for goods sold and delivered admitted obtaining the goods but alleged that he had bought them as trustee of an assigned estate and that credit had been extended to him as such, which was denied by the plaintiff, it was error on the part of the trial Judge to instruct the jury that the burden was on the plaintiff to show by a preponderance of evidence that he had sold and delivered the goods to the defendant individually. Defendant's answer in such case was in the nature of a plea of confession and avoidance and, having admitted obtaining the goods, he assumed the burden of proving the truth of his plea. *Mitchell* v. *Whitlock*, 166.
4. A complaint setting up separate causes of action against several parties, among whom there is no community of interests, is demurrable on the ground of misjoinder of causes of action and of parties. *Cromartie* v. *Parker*, 198.
5. Under the *Code*, the demand for relief in a complaint is immaterial and the Court will give any judgment justified by the pleadings and proof. *Gilliam* v. *Insurance Co.*, 369.
6. An amendment to a complaint, the effect of which is to confer and

not merely to *show* jurisdiction, will not be permitted; hence, where the amount sought to be recovered in an action brought in the Superior Court was not within its jurisdiction, the plaintiff cannot be allowed to amend his complaint by changing the cause of action and increasing the amount of the recovery prayed for so as to bring it within such jurisdiction. *Ib.*

7. When to amend a complaint in an action would have the effect of depriving the defendant of the benefit of the plea of the Statute of Limitations, which could be used against an original action, the amendment will not be allowed. *Ib.*
8. Where plaintiff sued for the price of "sawed timber" and afterwards filed an amended complaint alleging that one M. sold to defendants a "lot of logs" and that it was agreed between plaintiff and M. and the defendants that plaintiff should be paid a certain sum from the sale of one half thereof: *Held*, that the cause of action was changed by such amended complaint and the defendants had a right to set up in their answer thereto any and all legal defences, including the Statute of Limitations, just as if the action had been commenced at the date of the amended complaint. *Sams* v. *Price*, 392.
9. Though no counter-claim is pleaded the Court can order a reply to any defence set up in the answer or may allow it to be filed as a matter of defence. *James* v. *Railroad*, 530.

POSSESSION:

1. Actual possession of one tract of land does not give constructive possession of an adjoining tract separated from the other by distinct lines and boundaries. *Basnight* v. *Meekins*, 23.
2. Where, in the trial of proceedings to establish boundaries, under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession, but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff. *Ib*

POSSESSION AS NOTICE:

Possession to constitute notice must be open, notorious, exclusive and existing at the time of the purchase by the party to be affected thereby. *Patterson* v. *Mills*, 258.

POSSESSION OF BUILDING BURNED:

1. In an indictment under Sections 985 (6) of *The Code* directed against

setting fire to certain kinds of buildings "whether such buildings shall then be in possession of the offender or in the possession of any other person," it is not necessary to allege that the burned building was "in possession of" some person named. *State* v. *Daniel*, 574.

2. Possession of grantee of land is no evidence of grantor's possession of land not included in deed. *Worth* v. *Simmons*, 357.

POSSESSION UNDER COLOR OF TITLE:

1. Prior to the Revenue and Machinery Acts of 1887, a Sheriff's deed under a sale for taxes was (without other evidence) only color of title and not effective, unless aided by open, notorious and continuous possession for the statutory period. *Worth* v. *Simmons*, 357.
2. While the possession of a tenant of a parcel of land within a general boundary of land belonging to his lessor, is in law, the possession of the lessor up to the boundaries contained in the latter's deed, it is different as to the possession of a purchaser of such parcel, since the vendee, while deriving title from his vendor, does not hold possession under him, and his possession extends no further than the boundaries included in his own deed. *Ib.*

POWER OF SALE UNDER MORTGAGE:

One who makes a deed of trust for the purpose of securing the purchase price of a stock of goods and is allowed to remain in possession to conduct the business until default in specific payments, may give a valid title to any article included in the trust deed before his default and surrender of the goods to the trustee *Merritt* v. *Kitchin*, 148

PRACTICE:

1. When a judgment has been obtained against a County or other Municipal Corporation it is not necessary that notice as required in certain cases by Section 757 of *The Code* should be given before bringing an action for mandamus to compel the payment of the judgment. *Nicholson* v. *Commissioners*, 27.
2. This Court is bound to correct errors that appear on the face of the record on appeal whether they were excepted to below or not *Appomattox Co.* v. *Buffaloe*, 37.
3. A Court has no right to enter a final judgment by default on the charge of fraud and embezzlement for collecting and appropriating money received on collaterals, where the defendant makes no appearance or defence, but only a judgment by default and enquiry, if requested by the plaintiff. *Stewart* v. *Bryan*, 46.

4. Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, and judgment by default was entered, the presumption is that the judgment was rendered on the note, as was right, and not on the charge of fraud, which the Court had no right to do. *Ib.*

5. In such case, the judgment is final on the note and the cause is not retained on the docket for further action. *Ib.*

6. When the complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraud in the embezzlement of the proceeds of collaterals deposited as security for the note, and, in default of appearance and defense, judgment was rendered on the note but not on the charge of fraud, the plaintiff was not entitled to an order of arrest under Sections 291 and 447 of *The Code,* as amended by Ch. 541, Acts of 1891, since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. *Ib.*

7. An objection to the jurisdiction can be made at any stage of a proceeding. *Carey* v. *Allegood,* 54.

8. Consent of parties cannot give jurisdiction where it does not attach under the Constitution and laws. *Ib.*

9. A Justice of the Peace has no jurisdiction to direct the application, by a Sheriff, of the proceeds of an execution issued by another Justice of the Peace upon the ground that the latter was null and void. *Ib.*

10. Where, in an action for the alleged conversion of money, the complaint did not state that the funds were received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under Section 273 of *The Code,* conforming the complaint to the evidence. *Parker* v. *Harden,* 57.

11. When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. *Ib.*

12. In the consideration of an appeal from a judgment of non-suit the evidence must be taken in its strongest light against the defendant and everything it tends to prove must be taken as proved. *Bazemore* v. *Mountain,* 59.

13. An appeal from an order of the Court below setting aside the verdict on one of several issues and awarding a new trial thereon is premature and will be dismissed. In such case, an exception should have been noted which could have been passed upon on the appeal from the final judgment. *Benton* v. *Collins,* 66.

14. One Judge has no power to reverse or set aside, in whole or in part, a final order or judgment rendered by another Judge except on notice and a showing that there was on the part of the complainant mistake, inadvertance, surprise or excusable neglect by which he was injured. *Johnson* v. *Marcom*, 83.

15. A motion to amend a complaint after answer has been filed will not be allowed as a matter of course. *Goodwin* v. *Fertilizer Co.*, 91.

16. The allowance or refusal of a motion to amend the pleadings is a matter within the discretion of the trial Judge and no appeal lies therefrom. *Ib.*

17. Although, under Rule 17, the appellee may move to dismiss an appeal for appellant's failure to docket the same within the first two days of the call of the docket as required by Rule 5, yet such motion is too late if not made promptly and before the appellant actually dockets the appeal within the week but after the second day of the call. *Smith* v. *Montague*, 92.

18. The Rule requiring the record on appeal to be printed is complied with if the printing has been done when the case is called for argument. *Ib.*

19. A defect in the form of an order cannot be assigned as error on appeal unless excepted to on the trial below. *Robinson* v. *Sampson*, 99.

20. Where, in an action to recover land, the defendants pleaded as an estoppel a judgment rendered in a proceeding for the settlement of the estate of a deceased person under whom all parties claimed and the record shows that some of the heirs and distributees interested in such proceeding had died during the pendency thereof, and that their heirs had not been made parties to the case at bar; *Held*, that the case will be remanded by this Court, in order that all interested persons may be made parties and that the rights and equities of all may be disposed of in one final judgment. *Finlayson* v. *Kirby*, 106.

21. Where the party upon whom the burden of proof rests offers no evidence to prove the issue or none that the jury ought to find a verdict upon, the trial Judge should so announce and direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the Court withdraw the issue from the jury and direct an affirmative finding. *Bank* v. *School Committee*, 107.

22. An erroneous judgment is one entered regularly but contrary to law and can not be set aside at a subsequent term of the Court, while an irregular judgment is one entered contrary to the course and practice of the Court and may be set aside on motion if made after notice, within apt time. *Banking Co.* v. *Duke*, 110.

23. A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects *Ib.*

24. Where, in an action against the makers of a joint and several note, the complaint alleged no difference in the liability of the makers except in the prayer for judgment, and a judgment by default was entered against two of the defendants who failed to appear and answer; *Held*, that it was error, at a subsequent term and after due notice, to amend the judgment, on motion of the defendants, by inserting after their names the words "as sureties," it not being the practice of the Courts to see that evidence of suretyship is produced and such fact inserted in the judgment in the absence of the defendants and without any averment or request on their part *Ib.*

25. In the trial of an action on a note against the administrator of the deceased maker, the cashier of a plaintiff bank, the payee of the note, is a party in interest and disqualified under *Code* Section 590, from testifying as to conversations with intestate of defendant. *Banking Co.* v. *Walker*, 115.

26. Where an exception is made, for the first time in this Court, that the complaint does not state facts sufficient to constitute a cause of action, and the defects are such that they cannot be cured by additional averments, the action will be dismissed; but, if the defects, though too serious to be cured by a failure to demur, can possibly be cured by additional averments, this Court will not dismiss the action, but will grant a new trial, in order that the plaintiff may ask leave to amend. *Ladd* v. *Ladd*, 118.

27. Where, in the Court below, a dispute arose as to whether there had been service of a case on appeal, it was proper for the Judge to find the facts and, having found that there had not been such service within the statutory time, it was proper for him to order the appellant's "case on appeal" to be stricken from the files. *Hicks* v. *Westbrook*, 131.

28. A statement of case on appeal signed by the appellant's counsel with nothing to show that it was served within the prescribed time, or at all, upon the appellee or his counsel, is a nullity *Ib.*

29. The absence of a case on appeal does not entitle the appellee to have appeal dismissed, but, if no error appears on face of the record proper, the judgment below will be affirmed. *Ib.*

30. Pleadings are not required to be printed as a part of the record on appeal (except when case comes up on demurrer) unless material, and, if material, this Court will not dismiss the appeal for failure to print but will simply order the additional printing. *Barbee* v. *Scroggins*, 135.

31. Under Ch. 276, Acts of 1887, amendatory of Section 255 of *The Code.* the Judge, to whom a cause is sent by appeal or otherwise from the Clerk of a Superior Court, has full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the Clerk to be proceeded with by him. *Faison* v. *Williams*, 152.

32. Where, in an action to recover possession of land, the defendant failed to file answer or the bond required by Section 237 of *The Code*, and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under Section 390 of *The Code*, to give judgment against the defendant for possession of the land, without damages. *Jones* v. *Best*, 154.

33. Where an appellant fails to have printed as a part of the record on appeal an exhibit which was made, by the Judge or by agreement of counsel, a part of the case on appeal, the appeal will be dismissed. *Fleming* v. *McPhail*, 183.

34. An appeal from the judgment of a Clerk of the Superior Court refusing leave to issue execution on a judgment may be heard by the resident or presiding Judge of the District at Chambers in another County. *McCaskill* v. *McKinnon*, 192.

35. The Superior Court has no jurisdiction of an original motion to set aside an execution and order of sale granted by a Justice of the Peace. *Hamer* v. *McCall*, 197.

36. A complaint setting up separate causes of action against several parties, among whom there is no community of interests, is demurrable on the ground of misjoinder of causes of action and of parties. *Cromartie* v. *Parker*, 198.

37. Where there is not only a misjoinder of distinct causes of action but also a misjoinder of parties having no community of interests, the action cannot be divided under Section 272 of *The Code* which permits division only when the causes alone are distinct. *Ib.*

38. When, for any reason, one of the five members of this Court does not sit and the Court is evenly divided on the hearing of an appeal, the judgment below will be allowed to stand not as a precedent but as the decision in the case. *Puryear* v. *Lynch*, 255.

39. It cannot be assumed that an assignment of error is a correct statement of the facts therein recited when such facts do not appear in the case stated by the trial Judge. *Patterson* v. *Mills*, 258.

40. An omission to charge on a particular point is not error when no special instruction was asked thereon. *Ib*

41. Where a judgment by default final was rendered against a defendant who had employed an attorney but had neither attended Court nor given any excuse for his absence and had given his attorney no information upon which to interpose a defence; *Held*,

that his conduct was inexcusable negligence which did not entitle him to have the judgment set aside under Section 274 of *The Code. Cowles* v. *Cowles*, 272.

42. The refusal of a motion to set aside a judgment on the ground of surprise or excusable neglect is a matter of discretion with the Judge below and cannot be reviewed on appeal unless it should appear that such discretion was abused. *Ib.*

43. Where, in an action to recover money expended by plaintiff mortgagee for the benefit of defendant mortgagor, the verified complaint alleged a certain sum to be due from defendant to plaintiff on the implied promise to repay and no answer was filed, it was proper to render a judgment by default final. (MONTGOMERY, J., dissents). *Ib.*

44. If, in such case, on the facts stated in the complaint, the law did not raise an implied promise to repay, the judgment would be erroneous and not irregular and another Judge at a subsequent term would have no right to correct or set it aside. *Ib.*

45. When the petition for a *certiorari* is not verified as required by Rule 42, and no transcript of the record proper is filed, and no sufficient reason is given for the failure to docket the record and case on appeal, the motion will be denied. *Critz* v. *Sparger*, 283.

46 The failure of the Clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from *laches*. *Ib.*

47. Where a case was tried below after the commencement of the Term of this Court to which the appeal was taken, appellant is not prejudiced by a refusal of his motion for a *certiorari* returnable at such Term; but may docket his appeal at the next Term. *Ib.*

48. When the petition for a *certiorari* as a substitute for an appeal has not been verified as required by Rule 42, and no transcript of the record has been filed and no excuse shown for the failure to file it, the motion will be denied *Rothchild* v. *McNichol*, 284.

49. Though, in such case, the motion for a *certiorari* is denied, the appellant may docket the appeal at the Term of this Court to which it was taken before a motion is lodged for its dismissal or, if the case was tried below since the commencement of the Term to which the appeal was taken, the appellant may docket the appeal regularly at the next Term *Ib.*

50. Where, in an action brought in good faith to quiet plaintiff's title to land and to determine the adverse claims of the defendants, an interlocutory order was issued restraining the defendants from selling the land under a deed of trust, and material issues were

raised by the pleadings used as affidavits, and no facts were found by the Judge on the hearing of the rule to show cause, &c., it was error not to continue the injunction to the trial of the action. *Jones* v. *Buxton*, 285,

51. Although a contract for the purchase of land, relied upon by the defendant in his answer in an action to recover land, appears by the pleadings (in which the plaintiff set up the Statute of Frauds) to be void, nevertheless it was error, upon the call of the case for trial in the Court below to render judgment upon the pleadings, the defendant in such case, being entitled to have the case proceed to trial and to have the plaintiff to make out and recover upon the strength of his own title and not upon the weakness of the defendant's. *Lowe* v. *Harris*, 287.

52. Ordinarily, a motion for the appointment of a Receiver must be made before the resident Judge of a district or one assigned to the district or holding the Courts thereof by exchange, at the option of the mover; but it may be made before any other Judge, in which case the order, if granted, must be made returnable before one of such Judges. *Worth* v. *Bank*, 343.

53. Where proper proceedings for the appointment of a receiver are begun in two different Courts and a different receiver is appointed in each case, this Court, in determining the priority of appointment, as between the receivers, will take notice of fractions of a day. *Ib.*

54. The Court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other Courts of concurrent jurisdiction; and, hence, where permanent receivers were appointed in separate proceedings by different Courts having equal authority to appoint, the test of prior jurisdiction is not the first issuing of the summons, nor the first preparation and verification of the papers, nor which receiver first took possession, but which Court was first "seized of jurisdiction," by making an order upon legal proceedings exhibited before it, as by the appointment of a temporary receiver. *Ib.*

55. Where, in an action, there is a plea in bar, no reference should be ordered until such plea is determined; hence. *Smith* v. *City of Goldsboro*, 351.

56. Where a Justice of the Peace delayed rendering judgment until after the trial and the defendant (the party cast) hearing of the judgment served a written notice of appeal on the plaintiff and the Justice, on demand of defendant and the payment of his fees, made up the case and sent the same to the Superior Court where it was docketed, it was error in the Judge below to dismiss the

appeal, on motion of the plaintiff, upon the ground that no formal notice of the appeal was served upon the Justice of the Peace and that no notice of appeal was given at the trial. *Osborne* v. *Furniture Co.*, 364.

57. While it is the general rule that, when a bad ground has been assigned for an objection to testimony offered below, a good ground cannot be assigned on the hearing of the appeal, yet it is subject to the exception that, where testimony is offered to prove a fact which it is unlawful to prove by parol, it is the duty of the Court to exclude it without objection. *Presnell* v. *Garrison*, 366.

58. Where plaintiff sued for the price of "sawed timber" and afterwards filed an amended complaint alleging that one M sold to defendants a "lot of logs" and that it was agreed between plaintiff and M and the defendants that plaintiff should be paid a certain sum from the sale of one-half thereof; *Held*, that the cause of an action was changed by such amended complaint and the defendants had a right to set up in their answer thereto any and all legal defences, including the Statute of Limitations, just as if the action had been commenced at the date of the amended complaint. *Sams* v. *Price*, 392.

59. Although the Clerk of the Superior Court is allowed twenty days from the filing of the case on appeal in which to send up the transcript, yet he may do so at once without taking the whole twenty days or requiring his fees to be paid in advance, and if he does so the case is regularly constituted in this Court and the appellant cannot complain. *Caldwell* v. *Wilson*, 423.

60. Where an action involving title to public office is tried after the beginning of a Term of the Supreme Court and, on appeal from the judgment rendered, by observing the Statutory regulations, has come to such Term of the Supreme Court after the call of the District to which the cause belongs, the Court can, under Rule 13, set the case down for argument, though it is not entitled to be heard as of right. *Ib.*

61. This Court has no power to set aside or to pass upon the regularity of a writ of *supersedeas* issued by the Supreme Court of the United States. *Caldwell* v. *Wilson*, 480.

62. In an action in the nature of *quo warranto* to try the title of an office to which the relator had been appointed and had qualified, the judgment of this Court in his favor immediately upon its being filed, and *ex proprio vigore*, placed the relator in possession of the office with the right to exercise its duties and draw the salary attached thereto from the time of his appointment, and no process of this Court was necessary for that purpose. *Ib.*

63. In such case, the judgment of this Court, having taken effect im-

mediately, is not superseded by a writ of error from the United States Supreme Court, whether regular or irregular. *Ib.*

64. Though an execution issued from this Court was unnecessary to give effect to such judgment by placing the relator in possession of the office, it will not be recalled on motion of the defendant. *Ib.*

65. Inasmuch as the granting or refusing in this Court a new trial for newly discovered evidence is a matter of discretion resting upon the peculiar circumstances of each case and not a matter of law, so as to establish a precedent for future guidance, the Court will not discuss the facts but simply grant or refuse the motion. *Herndon* v. *Railroad Co.*, 498.

66. Where a motion in this Court for a new trial, for newly discovered testimony, is contemplated, notice of such motion, with a copy of the affidavit relied upon, should be served upon the opposite party at least ten days before the beginning of the call of the District to which the cause belongs. *Ib.*

67. Inasmuch as heretofore there has been no precedent requiring ten days notice of a motion for a new trial because of newly discovered testimony, and the appellee having had time to file counter affidavits, and having done so, the motion will not be denied for failure to serve such notice. *Ib.*

68. When a new trial is granted on motion in this Court, for newly discovered evidence, the costs in this Court will fall on the party making the motion, unless in exceptional cases and for special reasons. *Ib.*

69. An endorsement by counsel, who accepted service of case on appeal adding the date and stating that he did not waive the objection that the case was served too late, was competent and properly certified by the Clerk as a part of the proceedings in the case. *Barrus* v. *Railroad Co.*, 504.

70. The settlement of a case on appeal by the Judge does not cure the failure to serve the case within the time fixed by law. *Ib.*

71. The absence of a legally settled case on appeal does not entitle the appellee to have the appeal dismissed but, where no error appears on the face of the record proper, judgment must be affirmed. *Ib.*

72. Exceptions taken on a trial should not only be numbered (Rule 27) and noted on the margin of the record (Rule 21) but such numbering and marginal references should be printed as they are necessarily a part of the case on appeal. *Lucas* v. *Railway Co.*, 506.

73. An error as to the venue is not now, as formerly, a defect affecting jurisdiction but only ground for a motion to remove which is waived unless the motion is made "in writing" and "before the time of answering expires." *Ib.*

74. The fact that a complaint for injuries to real estate fails to expressly allege in what County the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper County. *Ib.*

75. Though no counter-claim is pleaded the Court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion. *Jones* v. *Railroad*, 530.

76. An exception to issues submitted or for failure to submit issues tendered can not be sustained where those submitted properly arose upon the pleadings. *Ib.*

77. An exception to the refusal of a prayer to instruct that there is no evidence will not be considered in this Court where the case on appeal does not set out the evidence itself or contain a statement that there was no evidence, the presumption being that the trial Judge charged the jury correctly upon the evidence adduced on the trial. *Ib.*

78. Appeals in criminal cases are regulated by the same rules as govern those in civil cases and must be begun and perfected according to the requirements of law on that subject. *State* v. *Cameron*, 572.

79. The statement of case on appeal in a criminal case must be submitted to the State's Solicitor for the District where the case is tried for acceptance or objection. *Ib.*

80. Counsel for a private prosecutor, who aids the Solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal. *Ib.*

81. Where the State's Solicitor is not present at the trial of a criminal prosecution, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the Court, and, in such case, the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal. *Ib.*

82. This Court renders judgment upon an inspection of the whole record and must, therefore, be satisfied of the sufficiency of such record. (Section 957 of *The Code.*) *State* v. *Daniel*, 574.

83. The attention of Clerks of the Superior Court is called to the necessity of observing the legal requirements in respect to making up transcripts of record on appeal in criminal cases so as to show the organization of the Court, that it was held at the time and place specified by law, that a grand jury was drawn, sworn and charged and presented the indictment set forth in the transcript. *Ib.*

84. A "broadside," or general, exception to the refusal of the trial Judge "to give the instructions as asked, and for instructions given," will not be considered in this Court. *State* v. *Webster*, 586.

85. The omission, in affidavit to appeal *in forma pauperis*, of the averment that it is made in good faith, is a fatal defect and for such defect the appeal will be dismissed as a matter of right and not of discretion. *State* v. *Bramble*, 603.

86. Exceptions to the sufficiency of evidence to support a verdict must be taken before verdict. *State* v. *Furr*, 606.

87. A judgment can be arrested in criminal cases only when the defect complained of appears upon the record proper. *Ib.*

PRESUMPTION:

1. Evidence that land sold for taxes had never been listed or assessed rebuts the presumption raised by section 72 of the Act of 1889 that a Sheriff's deed shows a proper listing and assessment. *Peebles* v. *Taylor*, 38.

2. In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker* v. *Harden*, 57.

PRESUMPTION OF FRAUD, 51.

PRINCIPAL AND AGENT, 122.

PRINCIPAL AND SURETY, 110, 244.

PRIOR OFFENCE, Evidence of, 623.

PRIORITY IN APPOINTMENT OF RECEIVER, 343.

PRISON HOUSE, Condition of, 301.

PRIVY EXAMINATION OF MARRIED WOMAN:

1. In the trial of an issue as to whether a married woman had been privily examined separate and apart from her husband, touching her free and voluntary consent to the execution of a mortgage signed by her, her own testimony that she did not declare such consent to the examining officer but objected to signing the instrument and signed it only after her husband told her to do so, and testimony of the examining officer that he did not explain the paper or the nature and purpose of the privy examination or question her as to her free consent, and other testimony showing that the husband was in sight and hearing of his wife and the officer

during the pretended examination, constituted evidence proper to be submitted to the jury upon the issue. *McCaskill* v. *McKinnon*, 214.

2. Where, in the trial of an issue whether a married woman voluntarily executed a mortgage and was privily examined separate and apart from her husband touching hor voluntary execution thereof, it appeared that the examining officer, purporting to have taken her acknowledgment, represented her as stating that she signed the same freely and voluntarily and the evidence was all directed to what she said at the time of the examination, it was not error to instruct the jury that if she, upon her examination, did not state to the officer that she signed the mortgage freely and voluntarily, the jury should answer the issue in the negative. *Ib.*

3. It is the duty of an officer, when taking the privy examination of a married woman as to her voluntary execution of an instrument, to explain the same to her and to see that the provisions of the Statute are strictly complied with; otherwise such examination is invalid. *Ib.*

PROCESS, 287.

PROCESS, Void:

1. A town or city constable cannot execute process outside of his town or city unless such process is directed to him in the name of the office he holds,—that is, as constable of his town or city. *Appomattox Co.*, v. *Buffalo*, 37.

2. A constable is not liable on his official bond for the release of a prisoner arrested by him on void process. *Ib.*

PROSECUTOR, Character of, 579.

PROXIMATE CAUSE:

1. On the trial of an action against a city for damages for the death, in its prison, of a person, who had been lawfully arrested and imprisoned for intoxication until he should become sober enough to stand trial or get bail, it was not error to instruct the jury that, if they should find from the evidence that the deceased had heart or kidney disease or other malady and that such disease alone, or such disease and excessive drinking of intoxicants combined, proximately caused the death, then they should find that such death was not occasioned by the neglect of the City to provide a suitable prison for the health and comfort of prisoners. *Coley* v. *Statesville*, 301.

2. In the trial of an action for damages for an injury resulting from the alleged negligence of defendant, it was not error to instruct the jury as to the proximate cause of the injury that "the first requisite of a proximate cause is the doing or omitting to do an act which a man of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omission did actually cause the injury." *Ib.*

PUBLIC ROADS, Failure to Work On:

1. The judgment of a Board of Commissioners ordering the laying out of a public road is final until reversed, is binding upon all citizens of a county and cannot be collaterally attacked. *State* v. *Joyce*, 610.

2. Where a Board of Commissioners ordered the construction of a public road, laid it out, appointed an overseer and assigned him hands to construct the road; *Held*, that such order constituted in the eye of the law a public road and the hands assigned were bound as for duty on any other road and were liable to indictment under *The Code*, Section 2020, if they refused to comply with the order. *Ib.*

PURCHASERS OF STATE, COUNTY OR MUNICIPAL BOND:

It is incumbent upon the purchasers of State, County and Municipal bonds to ascertain whether the authority to issue them has been granted according to the requirements of the Constitution. *Commissioners* v. *Snuggs*, 394.

PUNISHMENT CRUEL AND UNUSUAL, What Is Not:

A sentence to two years imprisonment and working on the roads is not "cruel and unusual" punishment for an unjustifiable and outrageous assault combined with robbery. *State* v. *Apple*, 584.

PURCHASER WITHOUT NOTICE, 76.

PURCHASING MILL LOGS WITHOUT MEASUREMENT, 538, 541.

QUALIFICATION OF EXECUTOR, Effect of, 328.

QUALIFICATIONS FOR OFFICE:

A Statute creating a Railroad Commission which prescribes that the Commissioners shall not be or become interested in any railroad, &c., is not unconstitutional because the qualifications required are in addition to those prescribed by the Constitution. *Caldwell* v. *Wilson*, 425.

QUO WARRANTO, 425.

1. The complaint in an action in the nature of *quo warranto* against several members of a Board of County Commissioners, alleging that the defendants held their offices by different tenures, from different sources and had forfeited them by different acts, is demurrable on the ground of a misjoinder of distinct causes of action, the action being directed not at the power or authority of the Board to act as such but at the separate right of each individual defendant to remain a member of the Board. *Cromartie* v *Parker*, 198.
2. Where, before the trial of the action, a relator obtained the consent of the Attorney General to prosecute the same in his name, and properly indemnified the State against the cost and expense of the action, it is immaterial that such consent was not applied for and obtained before the issuance of the summons. *Shennonhouse* v. *Withers*, 376.
3. It is not necessary that one who claims an office shall make a demand upon the occupant for its surrender before bringing his action to recover it, especially when the incumbent claims the right to the office and its emoluments. *Ib.*
4. In an action in the nature of *quo warranto* to try the title of an office to which the relator had been appointed and had qualified, the judgment of this Court in his favor immediately upon its being filed, and *ex proprio vigore*, placed the relator in possession of the office with the right to exercise its duties and draw the salary attached thereto from the time of his appointment, and no process of this Court was necessary for that purpose. *Caldwell* v. *Wilson*, 480.
5. In such case, the judgment of this Court, having taken effect immediately, is not superseded by a writ of error from the United States Supreme Court whether regular or irregular. *Ib.*
6. Though an execution issued from this Court was unnecessary to give effect to such judgment by placing the relator in possession of the office, it will not be recalled on motion of the defendant. *Ib.*

RAILROADS, (SEE, ALSO, "COMMON CARRIERS," "CORPORATIONS" AND "RAILROAD CORPORATIONS.")

1. The conductor of a side tracked train whose duty it is to close the switch and give the "all right" signal for the clear passage of another train on the main line, is the fellow servant and not the vice principal of the locomotive engineer of the latter train both being employees of the same Company. *Pleasants* v. *Railroad Company*, 492.
2. The fact that a switch was negligently left open whereby an accident was caused to a passing train is not evidence of a defect in

the roadbed for failure to keep which in safe condition a person thereby injured can recover damages from the Company. *Ib.*

3. Where, in the trial of an action for damages for an injury resulting from the negligence of a Railroad Company, it appeared that a conductor of a freight train had been employed as such only three or four weeks and that he negligently left open a switch to a side track on which a section of his train was standing and gave the "all right" signal to a passing train on the main track, in consequence of which a collision occurred; *Held*, that such a presumption of negligence in the employment of an incompetent servant was raised against the Company by such facts as to warrant the submission of an issue as to such negligence. *Ib.*
4. Where the rules of a Railroad Company required the employees of a side-tracked train to close the switch after getting upon the side track and, upon the approach of a train on the main track, to give the "go ahead" or "all right" signal, and also forbade a train passing on the main track to go ahead until the requisite signal was given; *Held*, in the trial of an action for damages for an injury resulting from the negligence of defendant's servant in giving the "go ahead" signal when the switch was open, that it was error to charge that, "it being admitted that the switch was capable of bearing a signal light which would have showed red where the track was unsafe, it was the duty of the Company to use such signal light upon the switch." *Ib.*
5. It is not error to charge that plaintiff cannot recover unless a locomotive engineer blew a whistle negligently, wantonly or maliciously, for the purpose of frightening plaintiff's horses, inasmuch as the word "negligently" is used in such a connection as to clearly import such a degree of negligence as would be nearly akin to wantonness or malice. *Everett* v. *Receivers*, 519.

RAILROAD COMMISSIONERS:

1. The office of Railroad Commissioner, established by Chapter 320, Acts of 1891, exists solely under the Constitution and laws of this State and was created to administer the Railroad Commission Act and, having no recognition in the laws of the United States and being concerned solely in domestic affairs and trade, does not interfere with inter-state commerce. *Caldwell* v. *Wilson*, 425.
2. Where a Railroad Commissioner, holding office under a Statute which makes it the duty of the Governor of the State to suspend him until the next meeting of the General Assembly in case he becomes subject to the disqualifications prescribed in the Statute, is cited by the Governor in writing to appear and answer certain charges recited in the notice as to his disqualification and, in re-

sponse thereto, appears or files an answer, such notice is, in effect, a citation and such appearance in person or by answer filed gives complete jurisdiction to the Governor and the consequent action of the Governor in suspending such Commissioner from office, followed by a notification of the suspension and an appointment of his successor, is "due process of law." *Ib.*

3. It is competent for the Legislature, in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor the right to suspend, the incumbent of the office. *Ib.*
4. The provision of the Railroad Commission Act, (Chapter 320, Acts of 1891) empowering the Governor, in certain contingencies, to suspend a Commissioner whose office is created by the Act, does not interfere with any vested right, but "prescribes" a rule of property in the office and modifies the extent of interest and tenure therein "prospectively," and one taking the office holds it subject to and is bound by all the provisions of the Act. *Ib.*
5. The Railroad Commission established by Chapter 320 Acts of 1891, is purely of legislative origin and is an *administrative* and not a *judicial* Court, and though, by subsequent Statute, the Commission was made a Court of Record, the object and effect of such amending Statute was simply to give authenticity to its records and proceedings and added nothing to its duties and powers. *Ib.*
6. A Statute creating a Railroad Commission, which prescribes that the Commissioners shall not be or become interested in any wise in any railroad, &c., is not unconstitutional because the qualifications required are in addition to those prescribed by the Constitution, such provisions being intended not to restrict the rights of the individual but to secure the faithful and efficient performance of public duties. *Ib.*

RAILROAD CORPORATION:

1. The sale of the Western North Carolina Railroad under a second mortgage and a conveyance thereunder subject to the first mortgage upon its franchise and corporate property did not extinguish the corporate existence of the Company nor release it from liability to the public for the manner in which it is operated. *James* v. *Railroad Co.*, 523.
2. The sale and conveyance of the property and franchise of the Western North Carolina Railroad Company made by a special Master to the Southern Railway Co , a foreign corporation under a decree of foreclosure of a second mortgage, subject to an existing first mortgage, did not *ipso facto*, under Sections 697 and 698 of *The Code* make the purchaser a domestic corporation, nor did such sale and

purchase make the Western North Carolina Railroad an integral part of the Southern Railway corporation. *Ib.*

3. In order that the sale of the franchise and property of a corporation under mortgage shall have the effect of a dissolution of such corporation as provided in Section 697 of *The Code*, another corporation must be provided, as contemplated in Section 1936 of *The Code*, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation. *Ib.*

4. It was neither the purpose nor effect of Sections 697 and 698 of *The Code* to create a foreign corporation in this State. *Ib.*

RAPE, Assault with Intent:

On the trial of an indictment for assault with intent to commit rape it was not error to charge that ' if the jury are satisfied beyond a reasonable doubt that the defendant laid hands upon the prosecutrix violently and against her will, for the purpose of having sexual intercourse with her, and that, at the time he so laid hands upon her, he intended to accomplish his purpose at all hazards in defiance of and notwithstanding any resistance she might make, then the defendant was guilty of an assault with intent to commit rape although he may have subsequently abandoned his purpose." *State* v. *Williams*, 628.

RE-ALLOTMENT OF HOMESTEAD:

Where, upon exception to a homestead allotment, the value of the property in question was fixed by a jury, and an order was made by the judge for a re-allotment in accordance with the jury's valuation; *Held*, that upon plaintiff's exception to the Commissioners' report of the second allotment which was not in accordance with the jury's valuation, it was proper to sustain the exception and to order a new allotment, and in such case evidence as to the considerations which influenced the jury in making its valuation was not admissible. *Shoaf* v. *Frost*, 256.

REASONABLE TIME:

The "reasonable time" for beginning an action on a cause, the statutory limitation of which has been shortened by the Legislature, is held to be "the balance of the time unexpired according to the law as it stood when the amending act is passed, provided it shall never exceed the time allowed by the new statute." *Culbreth* v. *Downing*, 205.

RECEIVER, Appointment of:

1. Ordinarily, a motion for the appointment of a Receiver must be made before the resident Judge of a district or one assigned to the district or holding the Courts thereof by exchange, at the option of the mover; but it may be made before any other Judge, in which case the order, if granted, must be made returnable before one of such Judges. *Worth* v. *Bank*, 343.
2. The Acts of 1891 (Chapter 155,) and of 1893 (Chapter 478,) do not give to the State Treasurer the exclusive right to institute proceedings for a receiver so as to take away the right of any creditor, by a general creditors' bill, to begin an action for that purpose in the Superior Court of the County where the bank is situated. *Ib.*
3. Where proper proceedings for the appointment of a receiver are begun in two different Courts and a different receiver is appointed in each case, this Court, in determining the priority of appointment, as between the receivers, will take notice of fractions of a day. *Ib.*
4. The Court which first takes cognizance of a controversy is entitled to retain jurisdiction until the end of the litigation, to the exclusion of all interference by other Courts of concurrent jurisdiction; and, hence, where permanent receivers were appointed in separate proceedings by different Courts having equal authority to appoint, the test of prior jurisdiction is not the first issuing of the summons, nor the first preparation and verification of the papers. nor which receiver first took possession, but which Court was first "seized of jurisdiction" by making an order upon legal proceedings exhibited before it, as by the appointment of a temporary receiver. *Ib.*

RECITALS IN DEED OF CORPORATION:

A recital in a deed of corporation. properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. *Caldwell* v. *Manufacturing Co.*, 339.

RECORD, Amendment of, 637.

RECORD ON APPEAL:

The Rule requiring the record on appeal to be printed is complied with if the printing has been done when the case is called for argument. *Smith* v. *Montague*, 92.

RECORDS, Destroyed:

Where the book of records of a board of township trustees is shown to have been destroyed by fire, the making of an order discontinuing a certain road can be proved by one of the trustees. *State* v. *Durham*, 546.

RECORD, Printing of on Appeal, 183, 506.

REFERENCE:

Where, in an action, there is a plea in bar, no reference should be ordered until such plea is determined. *Smith* v. *City of Goldsboro*, 350.

REGISTRATION:

Registration of a mortgage is notice of mortgagor's default and mortgagee's right of entry. *Ford* v. *Green*, 70.

REINSTATEMENT OF DISMISSED APPEAL: (See "Practice" and "Appeal."

RELATIONS, Near, Transactions between;

While transactions between near relatives, no one else being present, are suspicious and the testimony of one of the parties thereto should be carefully scrutinized, yet, if the testimony be of such a nature as to convince the jury of its truth, it is entitled to as much weight as that of any other witness. *Martin* v. *Buffaloe*, 34.

REMOVAL OF TRIAL TO ANOTHER COUNTY FROM COUNTY OF RIGHT VENUE:

Sections 196 and 197 of *The Code* forbid a removal of a cause from the County of the right *venue* to another unless the trial Judge shall be "satisfied" that justice demands it; and the granting or refusal of such motion, however strong the affidavits in support of or against the motion may be, and whether there be counter affidavits or not, is not reviewable. *State* v. *Smarr*, 669.

REPEAL OF STATUTE, 157.

REQUEST NOT TO SUE, Effect of, 244.

RES INTER ALIOS ACTA, 366.

REVISION OF JURY LIST, 669.

REVOCATION OF GUARANTY:

A surety for the faithful performance of duty by an agent, in an obligation of the form called a "continuing guaranty" has the right to withdraw from such obligation by giving notice to the principal, and is not liable for any defaults of the agent in matters entrusted to him after the service of such notice. *Manufacturing Co.* v. *Draughan*, 88.

RIGHT OF MORTGAGEE TO ENTER AFTER DEFAULT, 70.

RULE IN SHELLEY'S CASE, 326.

SALARY, Right of Holding over Officer to, 1.

SALE OF DECEDENT'S REAL ESTATE, 209.

SALE AND DELIVERY OF LIQUOR IN PROHIBITED TERRITORY, 6:

Where G., a resident of this State, living and doing business in a territory within which the sale of intoxicating liquors was prohibited, received at his home an order from a party living in another State for a certain quantity of whiskey at an agreed price and in pursuance of such order delivered the whiskey at a railroad station (also within the prohibited territory) for shipment to the purchaser at his home in another State; *Held*, that the transaction was a sale of liquor within the prohibited territory, and the question of interstate commerce does not affect the guilt or innocence of G. *State* v. *Groves*, 632.

SALE OF IMPOUNDED CATTLE:

1. Where a town ordinance made it the duty of the town constable to impound all cattle running at large within the town limits and authorized the sale of such cattle for the cost of taking, impounding and keeping the same, and the general law prohibited the authorities from charging any poundage or penalty in cases where the impounded cattle belonged to non-residents; *Held*, that a sale of an impounded cow, belonging to a non resident, for the cost of feeding her while impounded, was authorized and conferred a good title on the purchaser, since the cost of feeding is not embraced in the word "poundage or penalty." *Aydlette* v. *Elizabeth City*, 4.
2. Where the purchaser, in such case, surrendered the cow to the true owner, he cannot recover from the town authorities the amount which he bid and paid for the cow at the sale. *Ib.*

SALE OF LAND OF DECEDENT, Invalid proceeding for:

Where an administrator, in making a report of the sale of personalty, stated that the proceeds were insufficient to pay the debts; that intestate died seized of certain land in which the widow claimed a dower, and that she and the heirs desired to have the land outside of the dower sold to pay debts, but no summons was issued or served on the heirs making them parties and no order of sale was made; *Held*, that while the allegations contained in such report might have sufficed as an informal complaint, if proper parties had been made and an order of sale followed, yet, in the absence of such parties and order, the allegations were not sufficient to sustain a sale of the land by the administrator. *McNeill* v. *Fuller*, 209.

SALE OF LAND FOR TAXES:

1. The only authority given to a Sheriff or Tax Collector to enforce the lien on land for taxes is the tax-list with the order of the Clerk to the Sheriff to collect, endorsed thereon. The tax-collector can sell or distrain for taxes due only in cases where the property actually appears on the tax-lists and has been duly assessed. *Peebles* v. *Taylor*, 38.
2. Where real estate was not listed for taxation, an order given the tax-collector by the County Commissioners to list it and collect the same amounts as in former years invested him with no authority under the act to proceed to a sale, nor was he empowered to collect by sale or compulsion by an order of the Board of Commissioners allowing a party without title to list the land. *Ib.*
3. Evidence that land sold for taxes had never been listed or assessed rebuts the presumption raised by Section 72 of the Act of 1889 that a Sheriff's deed shows a proper listing and assessment. *Ib.*

SALE UNDER MORTGAGE, Void When:

A mortgagor being regarded as in the power of the mortgagee, the Courts require that the sale of personalty under a mortgage, like sales under execution, shall be made with such reasonable care as to produce the best results; hence, a sale by a mortgagee of a stock of merchandise, not in plain view but more than a hundred yards from the place of sale, and in a lump, was invalid. *Barbee* v. *Scroggins*, 135.

SALE OF RAILROAD UNDER SECOND MORTGAGE, 523.

SALE UNDER TRUST DEED:

1. A *cestui que trust* may buy at the trust sale for his benefit. *Monroe* v. *Fuchtler*, 101.
2. A sale of land made by a trustee fairly and according to the provisions of the deed will not be set aside for mere inadequacy of price, unless such inadequacy is so great as to cause all acquainted with the value of the land to say at once "the purchaser got the land for nothing." *Ib*
3. Where a purchaser of land at a sale under a deed of trust procured the auctioneer to bid it off for him without the knowledge of the trustee, the sale is not void but voidable only and can be set aside only when the party seeking the rescission is able to place the purchaser in *statu quo* and offers to do so. *Russell* v. *Roberts*, 322.
4. Where land was sold under the powers contained in a deed of trust and brought a fair price and the money was applied to the payment of the debt secured by the trust deed, the heirs of the trustor have no equity to have the sale set aside for a mere irregularity after the lapse of many years when it would be impossible to place the parties in *statu quo*. *Ib.*

SANITY OF TESTATOR, 336.

SCIRE FACIAS:

It is not necessary to issue a *scire facias* returnable to the next Term of a Court after the judgment *nisi* is taken on an appearance bond. *State* v. *Jenkins*, 637.

SEDUCTION, Trial for:

It is competent for the State, in the trial of an indictment for seduction, to show that there was sexual intercourse between the parties subsequent to the first alleged act. *State* v. *Robertson*, 551.

SELF-DEFENSE:

1. Where, in the trial of an indictment for murder, there is an entire absence, even of a scintilla, of evidence of self-defence, it is not error to instruct the jury that there was no evidence tending to show that the killing was done in self-defence. *State* v. *Byrd*, 684.
2. Where, in the trial of an indictment for murder, the wilful killing has been admitted or proved beyond a reasonable doubt, the burden rests upon the prisoner of showing such facts as he relies upon in mitigation or excuse, and for such purpose he has the equal benefit of all the evidence in the case whether introduced by himself

or by the State; but, though such mitigating facts be shown as will reduce the crime to manslaughter, the burden is still upon him to show such further facts as will excuse the homicide before he can be entitled to an acquittal. *Ib.*

3. In the trial of one charged with murder, facts offered by the accused in mitigation or excuse need not be proved beyond a reasonable doubt but only to the satisfaction of the jury. *Ib.*

4. Where, in the trial of one charged with murder, the wilful killing is admitted or proved and there is no evidence of self-defence, testimony as to the violent and dangerous character of the deceased and of his threats against the accused is not admissible *Ib.*

5. On the trial of one charged with murder, evidence of threats by the deceased against the accused and of the violent character of the deceased is not admissible to show self-defence unless such character was known and such threats communicated to the accused, except in cases where the evidence of the killing is entirely circumstantial. *Ib.*

SENTENCE OF CONVICTED CRIMINAL:

It is not improper for the trial Judge, in sentencing a person convicted of an offence, to recite in the judgment, as a reason for the severity of the sentence, the many offences of which the defendant has been previously convicted *State* v. *Wilson*, 650.

SENTENCE OF PRISONER, Unauthorized, 620.

SEPARATE ESTATE OF MARRIED WOMAN, 59, 214.

SERVANT, Negligent Employment of Incompetent:

Where, in the trial of an action for damages for an injury resulting from the negligence of a railroad Company, it appeared that a conductor of a freight train had been employed as such only three or four weeks and that he negligently left open a switch to a side track on which a section of his train was standing and gave the "all right" signal to a passing train on the main track, in consequence of which a collision occurred; *Held*, that such a presumption of negligence in the employment of an incompetent servant was raised against the Company by such facts as to warrant the submission of an issue as to such negligence *Pleasants* v. *Railroad Co.*, 492.

SERVICE OF CASE ON APPEAL, (See, also, "Case on Appeal"):

A statement of case on appeal signed only by the appellant's counsel with nothing to show that it was served within the prescribed time, or at all, upon the appellee or his counsel, is a nullity. *Hicks* v. *Westbrook*, 131.

SERVICE OF PROCESS:

Where a town charter provides for the appointment of a Chief of Police or marshal and authorizes him to execute all process directed to him by the Mayor or others and declares that, in the execution of such process, he shall have the same power, etc., which Sheriffs and Constables have, the service by such officer of a summons directed to "the Sheriff of W. County or town Constable of W. town" is valid. (*Davis* v. *Sanderlin*, 119 N. C., 84, distinguished). *Lowe* v. *Harris*, 287.

SETTLEMENT OF PAUPER, 295.

SHERIFF'S DEED FOR LAND SOLD FOR TAXES, 38.

SIGNALS, Railroad, 492.

SOLICITOR FOR THE STATE, 650:

1. The statement of case on appeal in a criminal case must be submitted to the State's Solicitor for the District where the case is tried for acceptance or objection. *State* v. *Cameron*, 572.
2. Counsel for a private prosecutor, who aids the Solicitor in the trial of a criminal case, has no authority to accept a statement of case on appeal. *Ib.*
3. Where the State's Solicitor is not present at the trial of a criminal prosecution, the case on appeal may be served on the attorney who represents him officially, with the sanction and approval of the Court, and, in such case, the appointment of such representative must be made a matter of record and appear in the transcript of the record on appeal. *Ib.*

SPECIAL PRIVILEGES, 643.

SPECIAL PROCEEDINGS:

1. Under Ch. 276, Acts of 1887, amendatory of Section 255 of *The Code,* the Judge, to whom a cause is sent by appeal or otherwise from the Clerk of a Superior Court, has full jurisdiction to hear and fully determine the cause, or to make orders therein and send it back to the Clerk to be proceeded with by him. *Faison* v. *Williams*, 152.

2. When three of four plaintiffs in a proceeding for partition moved, upon a petition filed in the cause before the Clerk, to set aside the report of the Commissioners on the ground of newly discovered testimony and to amend the complaint by inserting an allegation averring sole seizin in themselves and that the fourth party plaintiff was not entitled to any interest in the premises, and the Clerk refused the motion and sent the cause, on appeal, to the Judge; *Held*, that the Judge had power in his discretion to set aside the judgment for newly discovered testimony and to permit the amendment asked for. In such case, when the proceedings are remanded the appellant will have an opportunity to answer the amended complaint and to present issues of fact arising thereon. *Ib.*

SPECIAL VENIRE, 669.

SPECIFIC PERFORMANCE:

1. Where a contract relating to land is not objectionable legally, it is as much a matter of course for a Court of Equity to decree specific performance as it is for a Court of Law to give damages for breach of such contract. *Stamper* v. *Stamper*, 351.

SPY, Testimony of, 578.

STANDING TIMBER:

The term "mill logs" or "saw logs" does not include "standing timber" in the meaning of Section 1, Chapter 173, Acts of 1895, which makes it unlawful to sell or purchase mill logs in quantities of 1,000 feet or more without inspection and measurement by a sworn inspector. *State* v. *Addington*, 538.

STATE TREASURER, Duty of as to Insolvent Bank, 343.

STATUTE CHANGING REMEDY:

The Legislature may change the remedy and the Statute of Limitations which applies to the remedy, by extending or shortening the time for beginning an action; provided, in the latter case, a reasonable time is given for the commencement of the action before the Statute works a bar. *Culbreth* v. *Downing*, 205.

STATUTE, Constitutionality of:

1. Under Section 14 of Article 7 of the Constitution providing that the General Assembly shall have full power by statute to modify,

change, or abrogate any and all of the provisions of that article (except sections 7, 9 and 13) and substitute others in their stead, all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the Legislature; and hence. *Harris* v. *Wright*, 172.

2. Chapter 150, Acts of 1897, amending the charter of the City of Wilmington and providing for the election of one alderman only for each ward and the appointment by the Governor of the State of one alderman for each ward of said city, is constitutional and valid. *Ib.*

3, The delegation to the Governor of the State of the power of appointing a portion of the aldermen of a city is within the scope of the power entrusted to the discretion of the Legislature by Section 14, Article 7, of the Constitution. *Ib.*

4. The office of Railroad Commissioner, established by Chapter 320, Acts of 1891, exists solely under the Constitution and laws of this State and was created to administer the Railroad Commission Act and, having no recognition in the laws of the United States and being concerned solely in domestic affairs and trade, does not interfere with interstate commerce. *Caldwell* v. *Wilson*, 425.

5. It is competent for the Legislature, in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor the right to suspend, the incumbent of the office. *Ib.*

6. Section 1 of Chapter 320, Acts of 1891 (Railroad Commission Act) prescribes that, if either of the Commissioners whose election is provided for by such Act, shall be or become interested in any wise in any railroad company, &c., it shall be the duty of the Governor to suspend him from office until the next meeting of the General Assembly by a majority of which, in joint session, the question of his removal shall be determined. *Ib.*

STATUTE, Construction of, 612, 614.

STATUTE OF FRAUDS:

A party to a contract for the purchase of land, who has given his notes for the purchase price, is at the wrong end of the contract to plead or take advantage of the Statute of Frauds when the vendor, who has executed no bond for title, is nevertheless able and willing to convey a good title. *McNeill* v. *Fuller*, 209.

STATUTE OF LIMITATIONS, (See Limitations, Statute of).

STATUTE OF LIMITATIONS, Promise Not to Plead, 244.

STATUTE, Repeal of:

The repeal by Section 42, Chapter 185, Acts of 1897, of the penalty imposed by the Act of 1895, subsequent to the commencement of the action for such penalty, did not destroy the plaintiff's cause of action (Section 3764 of *The Code*). *Epps* v. *Smith*, 157.

STATUTE AUTHORIZING CREATION OF DEBT OR LEVY OF TAXES:

1. Section 14, Article 2, of the Constitution providing that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings which readings shall have been on three different days, and agreed to by each House respectively, and unless the *yeas and nays* on the second and third readings of the bill shall have been entered on the "Journal" is mandatory. *Commissioners* v. *Snuggs*, 394.
2. In the trial of an action to declare invalid bonds of a County issued in pursuance of the authority of an act of the General Assembly, it is competent to introduce in evidence the Journal of the House or Senate to show that such Act was not passed in conformity with the requirements of the Constitution, and when such Journal shows affirmatively that the Act authorizing the creation of the indebtedness, or the imposition of a tax, was not passed with the formalities required by Section 14, Article 2, of the Constitution, such Journal is conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled Act and such Act is invalid so far as it attempts to confer the power of creating a debt or levying a tax. (*Bank* v. *Commissioners*, 119 N. C., 214, followed and *Carr* v. *Coke*, 116 N. C., 223, distinguished. *Ib.*

STATUTES, Constitutionality of:

1. It is not unconstitutional for the Legislature to prescribe that resident owners of stock found running at large in a town shall pay a higher penalty than non-resident owners, it being a discrimination forbidden neither by Article 1, Section 7 of the Constitution of the State nor by the 14th Amendment to the Constitution of the United States. *Broadfoot* v. *Fayetteville*, 418.
2. A Statute which discriminates between the different counties of

the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities to which they are applicable and contain no violation of the principle of equation of taxation. *State* v. *Jones*, 616.

3. The Legislature has an unquestioned right to require an examination and certificate as to the competency of persons desiring to practice medicine or to exercise other callings affecting the public and requiring skill and proficiency. *State* v. *Call*, 643.
4. The fact that a Statute, requiring such examination and certificate, exempts from its requirements physicians already practicing in the State at the date of its passage does not make the Statute invalid as creating a monopoly or conferring special privileges, since it is only the exercise of the police power to protect the public from impostors and incompetents. *Ib.*
5. Nor does such Statute violate the Fourteenth Amendment of the Constitution of the United States prohibiting any State from denying to any person the equal protection of the laws, since such amendment does not restrict the powers of the State when the Statute applies equally to all persons in the same class, and the State is usually the judge of the classification. *Ib.*
6. Section 5 of Chapter 181, Acts of 1889, making it a misdemeanor to practice medicine without first having registered and obtained a certificate from the Clerk of the Superior Court, is not in conflict with and hence does not repeal Section 2 of Chapter 117, Acts of 1885, making it a misdemeanor to practice medicine for fee or reward without first having obtained a license from the Board of Examiners. *Ib.*

STATUTES, Repeal of, 643.

STOCK OF CORPORATION;

Under Section 664 of *The Code*, a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. *Cotton Mills* v. *Dunston*, 12.

STOCK LAW:

Since Chapter 219, Acts of 1885, makes it unlawful for any live stock to run at large in Buncombe county, and provides for a stock law requiring the erection of an outside fence around the county by the Board of Commissioners, it is no offence for a land owner of that county to remove his part of a division fence between his lands and his neighbor's, without regard to his intention to cultivate or make a pasture of his own land. *State* v. *Edmonds*, 679.

STOCKHOLDERS, Borrowing of Building and Loan Association, 126.

STREETS:

The use of a street for laying pipes, &c., in furnishing water, lights, &c., does not impose any additional servitude beyond those reasonably included in the dedication of all streets. *Smith* v. *City of Goldsboro*, 350.

SUBSCRIBER, Delinquent, to Stock of Corporation:

1. When used to designate a terminal point of time the word "by" means "not later than"; hence, a condition affixed to a subscription to the capital stock of a corporation that a certain amount should be subscribed for "by July 1st" was fulfilled by the total subscriptions reaching such amount on the night of July 1st. *Cotton Mills* v. *Dunstan*, 12.
2. Under Section 664 of *The Code*, a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. *Ib.*

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"SUIT PENDING AND AT ISSUE":

A juror who has a suit "pending" but not "at issue" at the term of the Court at which he has been drawn to serve, is not disqualified under Section 1728 of *The Code*. *State* v. *Smarr*, 669.

SUMMONS, Waiver of, 425.

SUPERSEDEAS, Writ of From United States Supreme Court:

1. This Court has no power to set aside or to pass upon the regularity

of a writ of *supersedeas* issued by the Supreme Court of the United States. *Caldwell* v. *Wilson*, 480.

2. The object of a summons being to bring the defendant into Court by giving him legal notice, his voluntary appearance, without limiting his appearance, is a waiver of a summons and he is as completely in Court as if he had been served therewith. *Ib.*

3. Where a Railroad Commissioner, holding office under a Statute which makes it the duty of the Governor of the State to suspend him until the next meeting of the General Assembly in case he becomes subject to the disqualifications prescribed in the Statute, is cited by the Governor in writing to appear and answer certain charges recited in the notice as to his disqualification and, in response thereto, appears or files an answer, such notice is, in effect, a citation and such appearance in person or by answer filed gives complete jurisdiction to the Governor and the consequent action of the Governor in suspending such Commissioner from office, followed by a notification of the suspension and an appointment of his successor, is "due process of law." *Ib.*

4. "Due process" is such process as is due to the particular circumstances of a case according to the law of the land. It does not necessarily imply a regular proceeding in a Court of justice or after the manner of such Courts, and a party cannot be said to have been deprived of his property "without due process" when he has had a fair hearing according to the modes of proceeding applicable to such cases. *Ib.*

SUPREME COURT, Costs of Appeal in Criminal Cases, 29.

SURETY, 244.

SURETY, Judgment Against, 110.

SURETY, Liability of:

A surety for the faithful performance of duty by an agent, in an obligation of the form called a "continuing guaranty," has the right to withdraw from such obligation by giving notice to the principals and is not liable for any defaults of the agent in matters entrusted to him after the service of such notice. *Manufacturing Co.* v. *Draughan*, 88.

SURVIVORSHIP, 251.

TAX DEED, 357.

TAX LIST:

The only authority given to a Sheriff or Tax-Collector to enforce the lien on land for taxes is the tax-list with the order of the Clerk to the Sheriff to collect, endorsed thereon. The tax-collector can sell or distrain for taxes due only in cases where the property actually appears on the tax-lists and has been duly assessed. *Peebles* v. *Taylor*, 38.

TAX SALE:

1. The only authority given to a Sheriff or Tax-Collector to enforce the lien on land for taxes is the tax-list with the order of the Clerk to the Sheriff to collect, endorsed thereon. The tax-collector can sell or distrain for taxes due only in cases where the property actually appears on the tax-lists and has been duly assessed. *Peebles* v. *Taylor*, 38.
2. Where real estate was not listed for taxation, an order given the tax-collector by the County Commissioners to list it and collect the same amounts as in former years invested him with no authority under the Act to proceed to a sale; nor was he empowered to collect by sale or compulsion by an order of the Board of Commissioners allowing a party without title to list the land. *Ib.*
3. Evidence that land sold for taxes had never been listed or assessed rebuts the presumption raised by Section 72 of the Act of 1889 that a Sheriff's deed shows a proper listing and assessment. *Ib.*

TAXES, Failure to Pay:

The failure to pay taxes before the day on which the collector's right to collect them by distress begins is not an indictable offence under Sections 52 and 53 of Chapter 168, Acts of 1897 (Machinery Act). *State* v. *Jones*, 616.

TAXES, INVALID, Action to Recover, 207.

TAXES, When Payable Under Act of 1897:

Under Section 35, Chapter 169 (Tax Machinery Act) of Laws of 1897, the tax payer may pay his taxes at any time before the last day of November without incurring any penalty or punishment, but under Section 36 the Sheriff, whenever justified reasonably by the facts in the case, may levy and collect by distress at any time after the first day of November. *State* v. *Bryant*, 569.

TESTATOR, Sanity of, 336.

TESTIMONY OF CLOSE RELATIONS:

1 While transactions between near relatives, no one else being present, are suspicious and the testimony of one of the parties thereto should be carefully scrutinized, yet, if the testimony be of such a nature as to convince the jury of its truth, it is entitled to as much weight as that of any other witness. *Martin* v. *Buffaloe*, 34.

2. An instruction to the jury on the trial of an indictment that they should scrutinize closely the testimony of the father and mother of defendant on account of the relationship but that, if their testimony was believed, it should have as much weight as that of other witnesses, was proper. *State* v. *Apple*, 584.

3. While the rule is that the law looks with suspicion upon the evidence of close relations and interested parties and it must be received with some degree of allowance, yet the rule does not reject or necessarily impeach it, and if, from the testimony or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. *State* v. *Lee*, 544.

TESTIMONY UNDER SECTION 590 OF THE CODE:

1. It is a matter of discretion of the trial Judge to allow a defendant, who has assumed the burden of proof, to open and conclude the argument. *Banking Co.* v. *Walker*, 115.

2. In the trial of an action on a note, although the payee is a competent witness to prove the handwriting of a witness thereto, whether the maker of the note be living or dead, yet he cannot testify, if the maker be dead, that one who purports to have made his cross mark to a paper, as witness, did in fact make his mark thereto, since that would be testimony concerning the transaction between the plaintiff and the deceased. *Bright* v. *Marcom*, 86.

THREATS, Evidence of:

On the trial of one charged with murder, evidence of threats by the deceased against the accused and of the violent character of the deceased is not admissible to show self-defence unless such character was known and such threats communicated to the accused, except in cases where the evidence of the killing is entirely circumstantial. *State* v. *Byrd*, 684.

TITLE:

1. A defendant in an action to recover land, who sets up title through

purchase of the land by his ancestor, is estopped to deny the title of the latter's grantor. *Collins* v. *Swanson*, 67.

2. Where, in an action to recover land, plaintiff and defendant claim title from a common source, the plaintiff is required only to show the better title from such source *Ib.*

3. Where in an action to recover land, the defendant set up as a title the alleged purchase of the land, by his ancestor, from the plaintiff's ancestor, J. S., and also pleaded the twenty years statute of limitations and admitted that plaintiffs were the heirs at law of J. S., and that the latter had died within 15 years prior to the commencement of the action, and the plaintiffs introduced testimony tending to show that the defendant had not been in possession of the land for 20 years; *Held*, that the burden of proof having been shifted upon the defendant, by the allegations in his answer and his admissions, to show a better title either by a valid conveyance from the common source to himself or his ancestor, or by making good his plea of the statute, it was error to non-suit the plaintiff. *Ib.*

TITLE, Color of, 76.

TIME OF HOMICIDE, Allegation of in Indictment, 659.

TORT, Action of:

A wife abandoned by her husband may sue alone for tort. *Brown* v. *Brown*, 8.

TOWN OFFICERS, Notice to of Defective Construction of Prison, 301.

TRANSACTION WITH DECEASED PERSON, 115:

In the trial of an action on a note, although the payee is a competent witness to prove the handwriting of a witness thereto, whether the maker of the note be living or dead, yet he cannot testify, if the maker be dead, that one who purports to have made his cross mark to a paper, as witness, did in fact make his mark thereto, since that would be testimony concerning the transaction between the plaintiff and the deceased. *Bright* v. *Marcom*, 86.

TRANSCRIPT OF RECORD ON APPEAL IN CRIMINAL CASES:

The attention of Clerks of the Superior Court is called to the necessity of observing the legal requirements in respect to making up transcripts of record on appeal in criminal cases so as to show the organization of the Court, that it was held at the time and place specified by law, that a grand jury was drawn, sworn and charged and presented the indictment set forth in the transcript. *State* v. *Daniel*, 574.

TRESPASS, 339.

TRIAL, 17, 148, 168:

1. Where, in the trial of proceedings to establish boundaries under the provisions of Chapter 22, Acts of 1893, the plaintiff claimed a parcel of land adjoining a tract of which he had actual possession, but failed to show any possession, actual or constructive, of the land in dispute, or to show title out of the State, or to connect his title with prior owners; *Held*, that it was not error to instruct the jury that, upon the evidence, the jury should find adversely to the plaintiff. *Basnight* v. *Meekins*, 23.
2. Where, on the trial of an action, a material fact is in dispute and the evidence thereon is conflicting, the trial judge cannot weigh the evidence and say how the fact was. *Burrus* v. *Life Insurance Co.*, 62.
3. Where, on the trial of an action, a material fact was whether a draft had been prosented to plaintiff for acceptance and payment and it appeared that plaintiff, having received notice that a draft had been drawn on him by the defendant, applied at the bank where he usually received drafts but defendant's draft had not been received and plaintiff testified that he was employed at a cotton gin; that his duties were outside the office and that he had no desk there but that his place of business was at his residence and that the draft had never been presented to him; while the bank collector testified that he took the draft to the gin for acceptance three times, left a printed notice and notified plaintiff's son. *Held*, that whether the draft had been duly presented was a question for the jury. *Ib.*
4. To make evidence competent it must tend to prove the matter in dispute and not relate to collateral facts merely. *Short* v. *Yelverton*, 95.
5. Where, in the trial of an action for the price of goods alleged to have been sold to the defendant, the contention was whether the sale was made to the defendant or his tenants and the defendant denied the purchase and introduced his tenants who testified that they bought the goods from plaintiff on their own account, at a certain price, it was error to permit plaintiff to prove that the goods cost him what defendant's witnesses claimed to have bought them for in order to show the unreasonableness of their testimony, since such matter was collateral to the issue and not a part of the *res gestae*. *Ib.*

6. While the entry of satisfaction of a mortgage on the margin of the registry, witnessed by the Register of Deeds, is competent evidence of the payment of the debt secured thereby, yet, on an issue "What amount, if any, has been paid on the debt due to M. S.," by plaintiff's intestate, entry of satisfaction of intestate's mortgage to a third person, introduced for the purpose of showing that the alleged debt of M. S. arose from the officious payment by her of such mortgage and was, therefore, not a debt of the estate, was irrelevant and incompetent. *Robinson* v. *Sampson*, 99.

7. Where the party upon whom the burden of proof rests offers no evidence to prove the issue or none that the jury ought to find a verdict upon, the trial judge should so announce and direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the Court withdraw the issue from the jury and direct an affirmative finding. *Bank* v. *School Committee*, 107.

8. A defendant in an action upon a note, who admits the execution of the instrument, but alleges payment, has a right to assume the burden on the trial. *Banking Co.* v. *Walker*, 115.

9. In the trial of an action on a note against the administrator of the deceased maker, the cashier of a plaintiff bank, the payee of the note, is a party in interest and disqualified under *Code*, Section 590, from testifying as to conversations with intestate of defendant. *Ib.*

10. It is a matter of discretion of the trial Judge to allow a defendant, who has assumed the burden of proof, to open and conclude the argument. *Ib.*

11. Notice to an administrator, defendant in an action, is, in law, notice to his attorney; and where, in the trial of an action, the administrator in reply to a notice to produce a note alleged to have been paid, stated that his intestate had told him that he had given it to his attorney, (who was also the administrator's attorney); *Held*, that the statement of the administrator, in return to the notice, reasonably meant that the intestate had given the note to his attorney as bearing on the matter of the suit, that the latter kept it in his possession and had it at the trial, and it was error to refuse plaintiff's request for an order on the attorney to produce the note. *Ib.*

12. In an action by the transferee of an unendorsed negotiable note against the maker, the latter may show, in evidence, the conditions upon which it was executed and delivered to the payee in order to show a failure of consideration, such evidence not being a contradiction of the terms of the written contract but proof of an additional verbal agreement. *Breese* v. *Crumpton*, 122.

13. When the burden of proof is upon a party who offers no evidence to support his contention, it is proper for the trial Judge to direct a verdict against him. *Barbee* v. *Scroggins*, 135.

14. Where a plaintiff mortgagee lawfully seized the mortgaged personalty on the 6th of March and the mortgagor on the 10th of March tendered an amount by the payment of which it was stipulated in the mortgage that the mortgage should be released, and it was refused and the property was sold, and in the trial of the action an issue was submitted as to the damages sustained by defendant, and there was no evidence tending to show a depreciation in the market value of the goods between March the 6th and March the 10th; *Held*, that it was harmless error to charge the jury that the measure of damages was the value of the goods on the 6th of March instead of on the 10th of March. *Ib.*

15. Where defendant in an action for goods sold and delivered admitted obtaining the goods but alleged that he had bought them as trustee of an assigned estate and that credit had been extended to him as such, which was denied by the plaintiff, it was error on the part of the trial Judge to instruct the jury that the burden was on the plaintiff to show by a preponderance of evidence that he had sold and delivered the goods to the defendant individually. Defendant's answer in such case was in the nature of a plea of confession and avoidance and, having admitted obtaining the goods, he assumed the burden of proving the truth of his plea. *Mitchell* v. *Whitlock*, 166.

16. In the trial of an action for the recovery of a machine on failure to pay an instalment due under a contract relating to it and called a "lease" but which contract did not provide that the defendant should become the owner upon payment of all the instalments, evidence was competent to show that the defendant was to become such owner when the machine should be paid for, whether the transaction is considered an incomplete contract or a conditional sale; and, in such case, it was not error to submit the question of ownership to the jury. *Manufacturing Co.* v. *Gray*, 168.

17. Where it appeared that such contract was for a new machine worth $45, it was competent to prove that the one delivered was an old machine and worth not more than $20. *Ib.*

18. Where, in the trial of an action for the recovery of damages for breach of contract to do certain work and place certain improvements upon land alleged to belong to the plaintiffs, the defendant having admitted in his answer that the plaintiffs were owners of the property in fee, the widow of the plaintiff husband (who had died pending the action) introduced a deed showing that the husband was a mere naked trustee for her benefit, without limitation

over or duties to perform; *Held*, that the introduction of such deed as evidence could not prejudice the defendant and was relevant as showing that by the death of the husband the surviving plaintiff became entitled to the whole amount of recovery. *Bizzell* v. *McKinnon*, 186.

19. Neither the trustee of a naked legal trust without the consent of the *cestui que trust*, nor the husband, without the consent of the wife, having the right to compromise or yield a right already accrued of the *cestui que trust* or wife, a letter from the deceased husband of the surviving plaintiff in an action for damages for breach of a contract in relation to improvements on land held by the husband in trust for the wife, which was offered to show satisfaction of the contract, was properly rejected. *Ib.*

20. In the trial of an action commenced by husband and wife and continued by the wife after the death of the former, for breach of a contract in relation to work and improvements which the defendant had agreed to perform and make upon land held by the husband in trust for his wife, the trust being a purely naked and legal one without limitation over or duties to be performed by the trustee, testimony of the defendant concerning conversations or transactions with the husband in reference to the contract and its satisfaction was properly excluded, not only as being in violation of Section 590 of *The Code* but for the better reason that defendant could not be heard to show that the rights of the wife and *cestui que trust* had been yielded or compromised by her husband and trustee, and on the further ground that there was no evidence that the husband was the agent of the wife in the transaction. *Ib.*

21. A verdict cannot be directed in favor of a party upon whom the burden of proof rests. *Eller* v. *Church*, 269.

22. Although a contract for the purchase of land, relied upon by the defendant in his answer in an action to recover land, appears by the pleadings (in which the plaintiff set up the Statute of Frauds) to be void, nevertheless it was error, upon the call of the case for trial in the Court below to render judgment upon the pleadings, the defendant in such case, being entitled to have the case proceed to trial and to have the plaintiff to make out and recover upon the strength of his own title and not upon the weakness of the defendant's. *Lowe* v. *Harris*, 287.

23. When the issues submitted on a trial are such as to enable the parties to present every phase of the controversy, no objection can be sustained either for those submitted or for refusing to submit other or different issues. *Coley* v. *Statesville*, 301.

24. On the trial of an action against a city for damages for the death, in its prison, of a person, who had been lawfully arrested and im-

prisoned for intoxication until he should become sober enough to stand trial or get bail, it was not error to instruct the jury that, if they should find from the evidence that the deceased had heart or kidney disease or other malady and that such disease alone, or such disease and excessive drinking of intoxicants combined, proximately caused the death, then they should find that such death was not occasioned by the neglect of the City to provide a suitable prison for the health and comfort of prisoners. *Ib.*

25. In the trial of an action for damages for injuries resulting in the death of plaintiff's intestate through alleged negligence of defendant, the true measure of damages is the present value of the net income of the deceased, to be ascertained by deducting the cost of his living and expenditures from his gross income, based upon his life expectancy, and in such calculation it is proper for the jury to consider the health and habits of the deceased at the time of his death. *Ib.*

26. In the trial of an action for damages for an injury resulting from the alleged negligence of defendant, it was not error to instruct the jury as to the proximate cause of the injury that "the first requisite of a proximate cause is the doing or omitting to do an act which a man of ordinary prudence could foresee might naturally or probably produce the injury complained of, and the second requisite is that such act or omisssion did actually cause the injury." *Ib.*

27. In the trial of an action for damages for the death of a person confined in the prison-house of defendant corporation and resulting from the alleged negligence of defendant, an instruction that "before plaintiff can recover the jury must find that the death of the deceased was caused by the defective construction of said prison and its unwholesome condition" is not inconsistent with another instruction that defendant would be liable "if the jury should find that the structure or conditions of the prison caused or accelerated the death of deceased." *Ib.*

28. Where, in the trial of an issue of *devisavit vel non*, the sanity of the testator is impeached, the burden of proof is upon the caveators. *In re Burn's Will*, 336.

29. Where on the trial of an issue of *devisavit vel non*, proof of the sanity or insanity is submitted to the jury, the fact that the testator disinherited all of his children save one to whom he left all his property, is competent evidence to be passed upon by the jury as bearing upon the capacity of the testator and, hence, is as much the proper subject of discussion by counsel, in the argument, as any other part of the testimony. *Ib.*

30. On the trial of an action for specific performance of a contract for

the purchase of land, the defendant defended on the ground that, as to a part of the land, plaintiff had no title, and plaintiff testified that he and the owner of the adjoining tract (since deceased) had agreed on the dividing line and according to such agreement he, the plaintiff, was the owner of the whole boundary sold to dedefendant. No party represented the deceased or claimed title under him. The defendant objected to the testimony on the ground that it was incompetent under Section 590 of *The Code*. *Held*, that, while the testimony was incompetent the objection that it was so under Section 590 of *The Code* was untenable, the true reasons for its incompetency being (1) that it was *res inter alios acta* and (2) that plaintiff could not be allowed to prove a title to the land by parol evidence. *Presnell* v. *Garrison*, 366.

31. While it is the general rule that, when a bad ground has been assigned for an objection to testimony offered below, a good ground cannot be assigned on the hearing of the appeal, yet it is subject to the exception that, where testimony is offered to prove a fact which it is unlawful to prove by parol, it is the duty of the Court to exclude it without objection. *Ib.*

32. Where, in the trial of an action for the rental of buildings which the lessee had abandoned for the alleged reason that, on account of the rising of water in the basement, the condition of the premises endangered the health of defendant's agents and employees, and that plaintiff was aware of but concealed the defect from defendant's agent, who contracted the lease, the trial Judge instructed the Jury that, if they should not believe that the condition of the basement became a nuisance, they should find for the plaintiff; *Held*, that such instruction was not objectionable as including the submission of a question of law to the jury when it was preceded in the charge by the statement that, if the basement became wet and its condition injurious to the health of the occupants of the building, then it was, in law, a nuisance. *Gaither* v. *Generator Co*, 384.

33. Where a jury retired at 11 a. m., to consider of their verdict, which was returned at 3 p. m, such verdict cannot be impeached because the Sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the Judge should tell him to take them to dinner. *Ib.*

34. Although testimony, which does not prove, or tend to prove the contention of either party to an action, is irrelevant and should properly be excluded, yet its admission is harmless error. *Edwards* v. *Phifer*, 388.

35. The fact that, in the trial of an action, one party happens to get the benefit of the testimony not strictly competent, does not jus-

tify the admission of incompetent evidence for the benefit of the other party (*Cheek* v. *Watson*, 90 N C., 302, disapproved). *Ib.*

36. When the substance of a party's prayer for instruction is given in the charge by the trial Judge, it is not necessary that the exact language of the prayer should be followed. *Ib.*

37. Where, in the trial of an action by the vendee of land against the vendor to recover the difference between $782, the contract price of the land, as plaintiff alleged, and the value of ten shares of stock in a Building and Loan Association which, as defendant alleged, the plaintiff subscribed for and assigned to him and agreed to keep up until maturity, and for which defendant received $1,000 at its maturity, the issues were: (1) "What was the purchase price of the property under the terms of the contract?" and (2) "Is the defendant indebted to plaintiff? If so, in what amount?"; and the jury responded to the first issue, ' Ten paid up shares in Building and Loan, and plaintiff was only to be made to pay therefor $782;" and to the second issue the response was "Thirteen dollars and interest:" *Held*, that the verdict was an explicit finding that the cantract price of the land was ten shares of stock as contended for by defendant, and plaintiff cannot complain of the inconsistent finding in response to the second issue, in her favor. *Ib.*

38. Where, on the trial of an action by a widow to have the heirs of her deceased husband declared trustees for her in land alleged to have been paid for with her own earnings but conveyed to her husband through fraud or mistake; and no creditors intervened, and it was in evidence that the plaintiff and her daughter had paid for the land out of their earnings, it was not error to refuse an instruction that, if the jury should find from the evidence that the land was paid for by such earnings, the plaintiff could not recover since, as a whole, the instruction prayed for would have been erroneous. *Cunningham* v. *Cunningham*, 413.

39. A trial by jury in suits at common law pending in the State Courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge, and the requirement of the Federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State Courts affecting property must be by jury, but it is met if the trial be had according to the settled course of Judicial proceedings. *Caldwell* v. *Wilson*, 425.

40. The Court can never find or direct an affirmative finding of the jury but may direct a negative finding when there is no evidence, or no such evidence as should be allowed to go to the jury, tending to establish the affirmative of the issue. *White* v. *Railroad Co.*, 484.

41. Where, in the trial of an action for damages caused by defendant's negligence, there is no evidence tending to prove contributory negligence, the Court may instruct the jury that there was no contributory negligence. *Ib.*

42. Where, in the trial of an action, the plaintiff has produced some, or more than a *scintilla* of, evidence in support of his contention, or there is conflicting evidence, it is the province of the jury to determine its weight and it would be improper to instruct the jury that if they believe the evidence the plaintiff cannot recover. *Everett* v. *Receivers*, 519.

43. It is not error to charge that plaintiff cannot recover unless a locomotive engineer blew a whistle negligently, wantonly or maliciously, for the purpose of frightening plaintiff's horses, inasmuch as the word "negligently" is used in such a connection as to clearly import such a degree of negligence as would be nearly akin to wantonness or malice. *Ib.*

44. While the rule is that the law looks with suspicion upon the evidence of close relations and interested parties and it must be received with some degree of allowance, yet the rule does not reject or necessarily impeach it, and if, from the testimony or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness. *State* v. *Lee*, 544.

45. In the absence of constitutional or statutory prohibition, it is in the discretion of a trial judge to permit the jury to visit the scene of the *res gestae*, in criminal and civil cases, whenever such visit appears important for the elucidation of the evidence but such visit must be carefully guarded to prevent conversation with third parties and no evidence must be taken. *State* v. *Perry*, 533.

46. The granting or refusing a new trial rests in the discretion of the trial Judge, when the circumstances are such as merely to put suspicion on a verdict by showing not that there was, but that there might have been undue influence brought to bear on the jury because there was opportunity; but, where the fact appears that undue influence was brought to bear on the jury or that they heard other evidence than that offered on the trial, this Court on appeal will, as a matter of law, grant a new trial whether the prisoner be convicted or acquitted, since there has been no trial in contemplation of law. *Ib*,

47. If upon the trial of an indictment for entry on land after being forbidden, such entry is shown or admitted, the burden is upon the defendant to show that he entered under a *bona fide* claim of right. *State* v. *Durham*, 546.

48. In such case, in addition to defendant's testimony that he believed he had a right to enter he must show that he had reasonable ground for such belief, and in the absence of such additional evidence it is the duty of the trial Judge to instruct the jury that, if they believe the evidence, the defendant is guilty. *Ib.*

49. In the trial of an indictment for entry upon land after being forbidden, the defendant testified that he believed he had a right to follow an old road across the land in question, but admitted that the road had been blocked for 10 or 11 years by wires put up for the purpose; *Held*, that the defendant's evidence of a *bona fide* belief, being unsustained by any evidence of a reasonable ground for such belief, was immaterial, and the trial Judge properly instructed the jury to find the defendant guilty if they believed the evidence. *Ib.*

50. It is competent for the State, in the trial of an indictment for seduction, to show that there was sexual intercourse between the parties subsequent to the first alleged act. *State* v. *Robertson*, 551.

51. Where, in the trial of an indictment for carrying a concealed weapon, it appeared that the defendant had on no overcoat and had put his pistol, 10 or 11 inches long, in an upper outside coat pocket and that the handle and two inches of the breech were exposed to view and that when it was handed to him to take on a journey he said he did not intend to conceal it, it was error to instruct the jury that, if they believed from the evidence that any part of the pistol was concealed, that it could not be seen from the outside, they should find the defendant guilty. *State* v. *Reams*, 556.

52. Whether the evidence in the trial of an indictment was such as justified the jury in proceeding to a verdict—such evidence as would reasonably satisfy an impartial mind—is a preliminary question for this Court on appeal. *State* v. *Satterfield*, 558.

53. Inasmuch as the Statute (Section 413 of *The Code*) requires that the trial Judge "shall state in plain and correct manner the evidence given in the case and declare and explain the law arising thereon," a charge to the jury, in the trial of an indictment for murder, where the evidence of guilt is conflicting, is insufficient which only defines the different degrees of murder and contains no array of the facts or instruction as to the law applicable to such facts as the jury may find to be true from the evidence. *State* v. *Groves*. 563.

54. Where a defendant on trial for a capital offence pleads "not guilty," his consent that the Judge need not read over his notes of the testimony is not a waiver of his right to have the law applied to the facts in his case as the law requires shall be done. *Ib.*

55. Where, on the trial of an indictment for selling liquor on Sunday, a witness for the State testified that he went to the defendant's restaurant as a spy for the police officer and for the purpose of making a case against the defendant, it was not error to refuse an instruction that it would be unsafe to convict the defendant upon the unsupported testimony of such witness *State* v. *Black*, 578.

56. In such case, it was proper to charge the jury that, if they believed the witness was a spy, they should scrutinize his testimony and, after doing so, if they believed his testimony to be true, it made no difference as to what his motive was in going to defendant's restaurant or as to what his character was. *Ib.*

57. On the trial of an indictment for rape and for carnally knowing and abusing a female child between ten and twelve years of age, it was not error to refuse to permit a witness to state that prosecutrix had proposed to have sexual intercouse with him, when defendants did not propose to show that the witness had actually had intercourse with her. *State* v. *Hairston*, 579.

58. Where, on the trial of a criminal action, the defendants had, without the direction or sanction of the Court, caused the jailer to bring a prisoner in the Court room to testify, it was not error for the trial Judge to order the witness to be sent back to jail after she had been examined for the defendants. *Ib.*

59. In the trial of an indictment for carnally knowing and abusing a female child between ten and twelve years of age, it was proper to allow her age to be shown by entries in a Bible where the witness states that he knew the handwriting of the child's mother, that the Bible had belonged to the mother and that the entries had been made by her and that she had been dead seven years. *Ib.*

60. It is not error to refuse to give instructions to the jury that were not asked for at or before the close of the evidence. *Ib.*

61. Where defendants were tried under an indictment containing two counts, one for rape and the other for abusing and carnally knowing a female child, and were convicted of the lesser offence, they cannot complain that the trial Judge stated to the jury that the punishment for rape was death by hanging, and for the other offence imprisonment in the penitentiary. *Ib.*

62. Error in the admission of incompetent testimony is cured by its subsequent withdrawal and a direction to the jury that they must neither consider it nor give it any weight in making up their verdict. *State* v. *Apple*, 584.

63. A party who elicits an unfavorable answer to a question on cross-examination cannot object to such answer. *Ib.*

64. An instruction to the jury on the trial of an indictment that they should scrutinize closely the testimony of the father and mother of defendant on account of the relationship but that, if their testimony was believed, it should have as much weight as that of other witnesses, was proper. *Ib.*

65. As forcible trespass is essentially an offence against the *possession* of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offence. *State* v. *Webster*, 586.

66. While to constitute forcible trespass the possessor must be present and forbidding or objecting, it is not necessary that he should be present all the time. It is sufficient if he is present before the trespass is *completed* which, if continued, becomes forcible after being forbidden even if not so in its incipiency. *Ib.*

67. On the trial of several defendants charged with an offence, upon an intimation from the Court as to the law and an indication from the counsel for the defendants that they would not argue the case to the jury except as to the guilt of two of them, the State's Solicitor stated that he would consent to a verdict of not guilty as to such two defendants. The defendants' counsel, after consultation, then stated that they would argue the case as to the others whereupon the solicitor withdrew his proposition as to the verdict concerning the two defendants. *Held*, that it was proper for the trial Judge to refuse to direct the State's solicitor to enter a verdict of not guilty as to the two defendants. *State* v. *McLean*, 589.

68. On the trial of a Justice of the Peace charged with compounding a felony, the Court was requested to instruct the jury, in substance, that the defendant, being a Justice of the Peace, is not guilty of compounding a felony for merely making an honest mistake in judgment in regard to his duty to dismiss the parties before him charged with the felony, and if he, through ignorance of law, failed to conduct the case in a regular and orderly manner "he is not guilty." His Honor gave the instructions modified by the substitution of the words, "This alone would not make him guilty" for the closing words of the prayer; *Held*, there was no error. *State* v. *Furr*, 606.

69. A judgment can be arrested in criminal cases only when the defect complained of appears upon the record proper. *Ib.*

70. It is only when the transactions are so connected or contemporaneous as to form a continuing action that evidence of a collateral offence will be heard to prove the intent of the offence charged. *State* v. *Graham*, 623.

71. In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible. *Ib.*

72. The objection that there is no sufficient evidence to go to the jury against defendants on trial is not ground for a motion in arrest of judgment, which can only be based upon defects apparent upon the face of the record. *State* v. *Wilson*, 650.

73. An exception that there is no evidence against defendants on trial sufficient to go to the jury is too late when taken after verdict. *Ibid.*

74. Declarations of one of two defendants jointly on trial for larceny are admissible only as against the party making them and, if admitted, it is error not to instruct the jury that such declarations are incompetent as to the other defendant. *State* v. *Collins*, 667.

75. In the trial of a person for burglary, it is not incompetent for him to show that other burglaries were committed in the same neighborhood about the same time as the one with which he is charged was committed. *State* v. *Smarr*, 669.

76. Where, in the trial of a criminal action, the defendant testifies in his own behalf and introduces no evidence as to his general character, but the State introduces evidence to show that such character is bad; *Held*, that such evidence by the State can be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. *State* v. *Traylor*, 674.

77. Where, in the trial of an indictment for murder, there is an entire absence, even of a scintilla, of evidence of self-defence, it is not error to instruct the jury that there was no evidence tending to show that the killing was done in self-defence. *State* v. *Byrd*, 684.

78. Where, in the trial of an indictment for murder, the wilful killing has been admitted or proved beyond a reasonable doubt, the burden rests upon the prisoner of showing such facts as he relies upon in mitigation or excuse, and for such purpose he has the equal benefit of all the evidence in the case whether introduced by himself or by the State; but, though such mitigating facts be shown as will reduce the crime to manslaughter, the burden is still upon him to show such further facts as will excuse the homicide before he can be entitled to an acquittal. *Ib.*

79. In the trial of one charged with murder, facts offered by the accused in mitigation or excuse need not be proved beyond a reasonable doubt but only to the satisfaction of the jury. *Ib.*

80. Where, in the trial of one charged with murder, the wilful killing is admitted or proved and there is evidence of self-defence, testi-

mony as to the violent and dangerous character of the deceased and of his threats against the accused is not admissible. *Ib.*

81. On the trial of one charged with murder, evidence of threats by the deceased against the accused and of the violent character of the deceased is not admissible to show self-defence unless such character was known and such threats communicated to the accused, except in cases where the evidence of killing is entirely circumstantial. *Ib.*

TRUST:

1. In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker* v. *Harden*, 57.
2. A trust terminates upon the death of the beneficiary. *Ib.*

TRUST DEED, Sale Under.

1. A *cestui que trust* may buy at the trust sale for his benefit. *Monroe* v. *Fuchtler*, 101.
2. A sale of land made by a trustee fairly and according to the provisions of the deed will not be set aside for mere inadequacy of price, unless each inadequacy is so great as to cause all acquainted with the land to say at once "the purchaser got the land for nothing!" *Ib.*

TRUSTEE, Liability of:

A trustee purchasing goods, or incurring any other liability on account of his trust, is personally liable for the payment thereof unless his liability is limited by an agreement, expressed or implied, with the creditor. *Mitchell* v. *Whitlock*, 166.

TRUSTEE OF NAKED TRUST, 186.

UNDUE INFLUENCE, 336.

VAGUE AND INDEFINITE DESCRIPTION:

A description of land contained in a contract for its sale was "A certain tract or parcel of land lying between P's. land and C's. Creek and the old mill land." *Held*, that such description was not too vague and indefinite to be explaind by parol testimony fitting the description to the land. *Sherman* v. *Simpson*, 129.

VALUATION OF HOMESTEAD, 256.

VARIANCE:

Where an indictment for murder charged the killing to have taken place December 5, 1896, and the evidence showed that, while the deceased was wounded on that day, he died three days thereafter, and before the bill of indictment was found; *Held*, that the variance was not fatal. *State* v. *Pate*, 659.

VENDOR AND VENDEE, 133, 357:

1. When a party makes a contract for the purchase of land and then repudiates it, he cannot recover money paid thereon. *Davison* v. *Land Co.*, 146.
2. While a bargainee of land is not bound to take a defective title from his bargainor, it is not necessary that the latter should have a perfect title at the date of the contract to sell, but it is sufficient if the title is perfect at the time the contract is attempted to be enforced by either party thereto. *McNeill* v. *Fuller*, 209.
3. A party to a contract for the purchase of land, who has given his notes for the purchase price, is at the wrong end of the contract to plead or take advantage of the Statute of Frauds when the vendor, who has executed no bond for title, is nevertheless able and willing to convey a good title. *Ib.*

VENUE, Change of:

Sections 196 and 197 of *The Code* forbid a removal of a cause from the County of the right *venue* to another unless the trial Judge shall be "satisfied" that justice demands it; and the granting or refusal of such motion, however strong the affidavits in support of or against the motion may be, and whether there be counter affidavits or not, is not reviewable. *State* v. *Smarr*, 669.

VERDICT, 388:

An appeal from an order setting aside a verdict on one of several issues and awarding a new trial thereon is premature. *Benton* v. *Collins*, 66.

VERDICT, Directing by Judge:

1. Under no circumstances can a verdict be directed in favor of the party upon whom the burden of proof rests. *Collins* v. *Swanson*, 67.
2. Where the party upon whom the burden of proof rests offers no evidence to prove the issue or none that the jury ought to find a verdict upon, the trial Judge should so announce and direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the Court

withdraw the issue from the jury and direct an affirmative finding. *Bank* v. *School Committee*, 107.

3. When the burden of proof is upon a party who offers no evidence to support his contention, it is proper for the trial Judge to direct a verdict against him. *Barbee* v. *Scroggins*, 135.

4. A verdict cannot be directed in favor of the party upon whom the burden of proof rests. *Eller* v. *Church*, 269.

VERDICT, Directed by Judge:

The Court can never find or direct an affirmative finding of the jury but may direct a negative finding when there is no evidence, or no such evidence as should be allowed to go to the jury, tending to establish the affirmative of the issue. *White* v. *Railroad*, 484.

VERDICT OF JURY, Impeachment of:

Where a jury retired at 11 a. m., to consider of their verdict, which was returned at 3 p. m., such verdict cannot be impeached because the Sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the Judge should tell him to take them to dinner. *Gaither* v. *Generator Co.*, 284.

VERDICT OF JURY, Meaning of, 17.

VESTED RIGHTS, 157.

VIOLENT CHARACTER OF DECEASED, Evidence of on Trial for Murder, 684.

VOID APPOINTMENT OF ADMINISTRATOR, 373.

VOID MARRIAGE, 297.

VOIDABLE SALE OF LAND UNDER TRUST DEED, 322.

WAIVER OF BREACH OF CONDITIONS IN LIFE INSURANCE POLICY, 290.

WAIVER BY PRISONER OF RIGHT TO HAVE TESTIMONY RECITED TO JURY:

Where a defendant on trial for a capital offence pleads "not guilty," his consent that the Judge need not read over his notes of the testimony is not a waiver of his right to have the law applied to the facts in his case as the law requires shall be done. *State* v. *Groves*, 563.

WAIVER OF SUMMONS, 425.

WANTONNESS:

An act is wantonly done when it is needless for any rightful purpose and manifests a reckless indifference to the rights and interests of another. *Everett* v. *Reivers*, 519.

WARRANTY OF CONDITION OF LEASED BUILDING:

The law, in leases, does not imply any warranty as to the quality or condition of the leased premises. *Gaither* v. *Generator Co.*, 384.

WEAPONS, Carrying Concealed, 556.

WEIGHT OF EVIDENCE:

Where, on the trial of an action, a material fact is in dispute and the evidence thereon is conflicting, the trial judge cannot weigh the evidence and say how the fact was. *Burrus* v. *Life Insurance Co.*, 62.

WIDOW:

A widow has no right of action against persons wrongfully causing the death of her husband, the Statute (*The Code*, Section 1498) giving a right of action alone to the personal representative of the person killed. *Howell* v. *Commissioners*, 362.

WIFE, Earnings of:

1. While in law, the earnings of a wife belong to the husband, he may give them to her or recognize and treat her as the owner of them, provided no creditors intervene. *Cunningham* v. *Cunningham*, 413.

2 Where, on the trial of an action by a widow to have the heirs of her deceased husband declared trustees for her in land alleged to have been paid for with her own earnings but conveyed to her husband through fraud or mistake; and no creditors intervened, and it was in evidence that the plaintiff and her daughter had paid for the land out of their earnings, it was no error to refuse an instruction that, if the jury should find from the evidence that the land was paid for by such earnings, the plaintiff could not recover since, as a whole, the instruction prayed for would have been erroneous. *Ib.*

WIFE, Right to Sue Without Joinder of Husband:

Under a reasonable construction of the Constitution and Section 1832 of *The Code*, a wife abandoned by her husband may maintain an action *in tort* in her own name, against a third person. *Brown* v. *Brown*, 8.

WIFE, Testimony of, 544.

WILL, Construction of, 328:

A testator devised lands as follows: "I loan the land whereon I now live to my daughter Mary during her natural life and give the same to the heirs of her body, but, if she should have no lawful heirs of her body, the said land at her death shall go back to my son William." *Held*, that the rule in Shelley's case has no application to the estate devised to Mary or William, the expression "heirs of the body," in view of the explanatory words contained in the clause, being construed "issue." *Bird* v. *Gilliam*, 326.

WITNESS:

1. In the trial of an action on a note, although the payee is a competent witness to prove the handwriting of a witness thereto, whether the maker of the note be living or dead, yet he cannot testify, if the maker be dead, that one who purports to have made his cross mark to a paper, as witness, did in fact make his mark thereto, since that would be testimony concerning the transaction between the testimony and the deceased. *Bright* v. *Marcom*, 86.
2. While transactions between near relatives, no one else being present, are suspicious and the testimony of one of the parties thereto should be carefully scrutinized, yet, if the testimony be of such a nature as to convince the jury of its truth, it is entitled to as much weight as that of any other witness. *Martin* v. *Buffaloe*, 34.
3. Under Section 588, of *The Code*, a divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to divorce. *State* v. *Raby*, 682.
4. Where, on the trial of an indictment for selling liquor on Sunday, a witness for the State testified that he went to the defendant's restaurant as a spy for the police officer and for the purpose of making a case against the defendant, it was not error to refuse an instruction that it would be unsafe to convict the defendant upon the unsupported testimony of such witness. *State* v. *Black*, 578.
5. In such case, it was proper to charge the jury that, if they believed the witness was a spy, they should scrutinize his testimony and, after doing so, if they believed his testimony to be true, it made no difference as to what his motive was in going to defendant's restaurant or as to what his character was. *Ib.*

WRONGFUL ACT, Death Caused by:

A widow has no right of action against persons wrongfully causing the death of her husband, the Statute (*The Code*, Section 1498) giving a right of action alone to the personal representative of the person killed. *Howell* v. *Commissioners*, 362.

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